UDA Holdings Bhd (formerly known as Perbadanan Pembangunan Bandar) v Melewar Leisure Sdn Bhd (formerly known as Harta Bumi Sdn Bhd)

HIGH COURT (KUALA LUMPUR) — SUIT NO S6–22–416 OF 2001
ABDUL MALIK ISHAK J
31 DECEMBER 2008

Civil Procedure — Pleadings — Facts not pleaded — Whether could be considered by court

Land Law — Acquisition of land — Award — Distribution between lessor and lessee of land — Terms of agreement — Whether lessor entitled to whole sum — Whether sum incurred for renovations and improvements of land to be paid to lessee

Land Law — Acquisition of land — Compensation — Valuation report — Whether should bind both parties — Whether scope of valuer's duty agreed upon

Tort — Negligence — Damages — Valuation report — Whether valuer applied golden rule of interpretation — Whether defendant suffered any loss or damage — Whether valuer breached duty

The plaintiff leased a piece of land to the defendant for a period of 75 years commencing from 20 April 1989. With the advantage of a long lease, the defendant developed the demised premises and turned it into the Central Market and the Central Square. Subsequently, the government gave notice of its intention to compulsorily acquire part of the land under the Land Acquisition Act 1960 for the purpose of 'Projek Sistem Kedua Transit Aliran Ringan' ('LRT') untuk Kuala Lumpur'. Following this an enquiry was held for claims for compensation arising from the acquisition. During the enquiry, valuation reports of the parties were submitted to the land administrator. The first valuation report dated 28 April 1995 was from Messrs Khong & Jaafar Sdn Bhd and it was prepared for the benefit of the defendant supporting the defendant's compensation claim for the sum of RM14,336,090. A second valuation report dated 28 April 1995 prepared by the same valuers for the benefit of the plaintiff in support of its compensation claim to the amount of RM382,157. A third valuation report dated 29 June 1995 by the government

valuer proposed compensation of RM942,178 in favour of the plaintiff and the sum of RM8,465,693 in favour of the defendant. After hearing the evidence of the witnesses from both sides, the land administrator made the awards that the sum of RM382,157 would be paid to the plaintiff as the lessor of the land; that the sum of RM8,461,393 would be paid to the defendant as the lessee out of which the sum of RM7,199,840 was for the land and the sum of RM1,261,553 was for the depreciation in the value of the land in question and that the sum of RM5,000 was for the plaintiff's staff cooperative society as a tenant of the land.

Dissatisfied with the land administrator's award, the parties referred the matter to the High Court. Subsequently, the defendant collected its compensation of RM8,461,393 from the land administrator. Thereafter the plaintiff withdrew its reference to the High Court. The parties appointed CH Williams Talhar & Wong Sdn Bhd ('the valuer') to revalue the quantum and distribution of the compensation monies to the parties. However, a dispute arose between the parties as to the apportionment of the acquisition award. The plaintiff then filed this action against the defendant in order to obtain the distribution of compensation under the award based on section 9.01(c) of the lease agreement. The defendant on the other hand counterclaimed against the plaintiff and the valuer based on their distribution of the said monies and the scope of the valuers' duty.

Held, allowing the plaintiff's claim with costs and dismissing the defendant's counterclaim with costs:

(1) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition of interpreting the lease agreement. In interpreting the written contracts, the law does not require the judges to attribute to the parties, an intention which they plainly could not have had. But it is the duty of the court to give effect to the language employed even though the consequences may appear harsh for one side or the other (see para 68).

(2) Pursuant to sections 9.01(a) and 9.01(b) of the lease agreement it was clear that the intention of the parties was that the plaintiff as the lessor and the registered proprietor of the land — to whom the right of reversion exists upon expiry of the lease agreement, shall be the rightful party to receive the compensation monies. It was expressly agreed in para (c) of section 9.01 of the lease agreement that out of the sum, the defendant as the lessee shall be reimbursed the 'actual cost' of renovations and improvements, after deducting the 'actual cost' previously incurred by the defendant as the lessee and whatever remained 'shall belong to the plaintiff absolutely'. Thus, the plaintiff

was entitled to the whole award save for the amount in respect of the 'actual cost' incurred by the defendant (see paras 69–70).

(3) The scope of the work as agreed by the parties gave the valuer the right to undertake legal interpretation of the lease agreement. It was clearly worded and was not unambiguous. Therefore there was no cogent proof that the valuer had exceeded the boundaries of its mandate or that there was a patent error appearing on the face of the valuer's report. That being the case, the valuation report should bind both parties (see paras 95 & 100).

(4) The parties were bound by their pleadings; in the absence of pleadings, evidence if produced by the parties cannot be considered and no party shall be permitted to travel beyond its pleadings. On the facts, the defendant had never pleaded that the valuer had breached its alleged duty owed to itself by giving a 'legal' interpretation of the clause in the lease agreement and the defendant had failed to particularise the details as to how the valuer had gone beyond the scope of works stipulated in the letter of appointment (see para 151).

(5) Further, the defendant had no cause of action against the valuer in negligence because the defendant had not suffered any loss or damage. The defendant did not pay out anything to the plaintiff pursuant to the valuer's report upon receipt of the compensation monies. There was thus no actionable tort. The duty of care owed was merely that of a prudent and reasonable valuer and not as a lawyer. In the circumstances, the valuer had not breached its duty as it had applied the golden rule of interpretation (see para 157).

[Bahasa Malaysia summary

Plaintif memajak sebidang tanah kepada defendan untuk tempoh 75 tahun bermula dari 20 April 1989. Dengan kelebihan tempoh pajakan yang lama, defendan memajukan premis tersebut dan menukarnya kepada Pasar Seni dan Medan Pasar. Kemudian, kerajaan memberikan notis mengenai niatnya untuk mengambil secara wajib, sebahagian tanah tersebut di bawah Akta Pengambilan Tanah 1960 untuk tujuan 'Projek Sistem Transit Aliran Ringan ('LRT') untuk Kuala Lumpur'. Berikutan ini, satu siasatan diadakan untuk tuntutan pampasan yang timbul daripada pengambilan tersebut. Semasa siasatan tersebut, laporan penilaian pihak-pihak dikemukakan kepada pentadbir tanah. Laporan penilaian yang pertama bertarikh 28 April 1995 daripada Tetuan Khong & Jaafar Sdn Bhd dan ia disediakan untuk faedah defendan menyokong tuntutan pampasan defendan untuk jumlah sebanyak RM14,336,090. Laporan penilaian kedua bertarikh 28 April 1995 disediakan oleh penilai yang sama untuk faedah plaintif menyokong tuntutan pampasannya untuk jumlah sebanyak RM382,157. Laporan penilaian ketiga

bertarikh 29 Jun 1995 oleh penilai kerajaan mencadangkan pampasan sebanyak RM942,178 untuk plaintif dan jumlah sebanyak RM8,465,693 untuk defendan. Selepas mendengar keterangan saksi-saksi kedua-dua belah pihak, pentadbir tanah tersebut memberikan award bahawa jumlah sebanyak RM382,157 akan dibayar kepada plaintif sebagai pemberi pajak tanah; bahawa jumlah sebanyak RM8,461,393 akan dibayar kepada defendan sebagai pemajak yang daripada jumlah tersebut RM7,199,840 adalah untuk tanah tersebut dan jumlah sebanyak RM1,261,553 adalah untuk penyusutan nilai tanah yang dipersoalkan dan bahawa jumlah sebanyak RM5,000 adalah untuk persatuan koperasi pekerja plaintif sebagai salah satu penyewa tanah tersebut.

Tidak puas hati dengan award pentadbir tanah, pihak-pihak merujuk perkara tersebut kepada Mahkamah Tinggi. Kemudian, defendan mengambil pampasannya sebanyak RM8,461,393 daripada pentadbir tanah. Kemudian, plaintif menarik balik rujukannya ke Mahkamah Tinggi. Pihak-pihak tersebut melantik CH Williams Talhar & Wong Sdn Bhd ('penilai') untuk menilai semula kuantum dan pengagihan wang pampasan kepada pihak-pihak. Walau bagaimanapun, pertikaian timbul di antara pihak-pihak berkaitan dengan pembahagian award pengambilan. Plaintif kemudian memfailkan tindakan ini terhadap defendan untuk memperoleh pengagihan pampasan di bawah award tersebut berdasarkan seksyen 9.01(c) perjanjian pajakan tersebut. Defendan sebaliknya menuntut balas terhadap plaintif dan penilai berdasarkan pengagihan wang mereka dan skop tanggungjawab penilai.

Diputuskan, membenarkan tuntutan plaintif dengan kos dan menolak tuntutan balas defendan dengan kos:

(1) 'Peraturan' bahawa perkataan-perkataan perlu diberi 'maksud asal dan biasa' menggambarkan kenyataan munasabah dalam mentafsir perjanjian pajakan. Dalam mentafsir kontrak bertulis, undang-undang tidak memerlukan hakim untuk memberikan anggapan kepada pihak-pihak, niat yang sememangnya tidak difikirkan. Tetapi ia adalah tanggungjawab mahkamah untuk memberikan penekanan kepada bahasa yang digunakan walaupun akibatnya mungkin kelihatan teruk untuk satu pihak atau yang satu lagi (lihat perenggan 68).

(2) Menurut seksyen-seksyen 9.01(a) dan 9.01(b) perjanjian pajakan tersebut, jelas bahawa niat pihak-pihak adalah bahawa plaintif sebagai pemberi pajakan dan pemilik berdaftar tanah tersebut — yang kepadanya hak untuk pengembalian wujud apabila perjanjian pajakan tamat, sewajarnya adalah pihak yang berhak untuk menerima wang pampasan. Ia dipersetujui secara nyata dalam perenggan (c) seksyen 9.01 perjanjian pajakan bahawa daripada jumlah tersebut, defendan

sebagai pemajak perlu dibayar balik 'actual cost' untuk pengubahsuaian dan pembaikan, selepas menolak 'actual cost' yang sebelumnya dibelanjakan oleh defendan sebagai pemajak dan apa-apa baki 'shall belong to the plaintiff absolutely'. Oleh itu, plaintif berhak kepada keseluruhan award kecuali jumlah berkenaan dengan 'actual cost' yang dibelanjakan oleh defendan (lihat perenggan 69–70).

(3) Skop kerja seperti yang dipersetujui oleh pihak-pihak memberikan penilai hak untuk membuat pentafsiran perjanjian pajakan tersebut dari segi undang-undang. Ia adalah tertulis jelas dan nyata. Oleh itu tidak ada bukti yang kukuh bahawa penilai telah melampaui batas mandatnya atau bahawa terdapat kesilapan yang jelas wujud di dalam laporan penilai. Disebabkan ini, laporan penilaian sewajarnya mengikat kedua-dua pihak (lihat perenggan 95 & 100).

(4) Pihak-pihak terikat dengan pliding mereka: di dalam ketiadaan pliding, keterangan jika dikemukakan oleh pihak-pihak tidak boleh dipertimbangkan dan tidak ada pihak yang boleh dibenarkan untuk melampaui batasan plidingnya. Di atas fakta, defendan tidak pernah memplid bahawa penilai telah memungkiri kewajipan yang didakwa dipertanggungjawabkan kepada dirinya sendiri dengan memberikan pentafsiran 'legal' klausa di dalam perjanjian pajakan dan defendan telah gagal untuk memberikan butiran mengenai bagaimana penilai telah melampaui skop tanggungjawab yang dinyatakan di dalam surat pelantikan (lihat perenggan 151).

(5) Selanjutnya, defendan tidak mempunyai kausa tindakan terhadap penilai dalam kecuaian kerana defendan tidak mengalami sebarang kerugian. Defendan tidak membuat apa-apa bayaran kepada plaintif menurut laporan penilai selepas menerima wang pampasan. Oleh itu tidak terdapat tort yang boleh didakwa. Kewajipan berjaga-jaga adalah hanya sebagai penilai yang bijak dan munasabah dan bukan sebagai seorang peguam. Dalam hal ini, penilai tidak melanggar kewajipannya kerana ia telah mengguna pakai peraturan pentafsiran (lihat perenggan 157).]

Notes

For cases on award, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1797–1840.

For cases on compensation, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1843–1875.

For cases on damages, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 936–950.

For cases on facts not pleaded, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5401–5407.

Cases referred to

Bank of Credit and Commerce International SA (in liquidation) v Ali & Ors [2001] 2 WLR 735, HL (refd)

Caledonian Railway Company v North British Railway Company (1881) 6 App Cas 114, HL (refd)

Capital Corp Securities Sdn Bhd v Abdul Malek Beh bin Abdullah [2005] 7 MLJ 35, HC (refd)

Equitable Life Assurance Society v Hyman [2000] 3 All ER 961; [2002] 1 AC 408, HL (refd)

Ganesh Trading Co v Moji Ram AIR 1978 SC 484 (refd)

Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd [1991] 1 MLJ 33, SC (refd)

Hadley & Anor v Baxendale & Ors (1854–1860) All ER Rep 461 (refd)

Hambros Leasing Limited v Weatherall Green & Smith (a firm) [Queen's Bench Division] (Transcript) 21 February 1997 (refd)

Hari Chand v Daulat Ram AIR 1987 SC 94 (refd)

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, HL (refd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196, HC (refd)

John Grey & Ors v William Pearson & Ors (1857) 6 HL Cas 61; (1857) 10 ER 1216 (refd)

K Kanakarathnam v A Perumal & Anor AIR 1994 Mad 247 (refd)

Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd [1984] 1 MLJ 243, FC (refd)

L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235, HL (refd)

Ling Nam Rubber Works v Leong Bee & Co [1968] 1 MLJ 216, FC (refd)

Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, HL (refd)

Maunsell v Olins & Anor [1975] AC 373, HL (refd)

Narinder Nath (deceased by LRs), Petitioner v Lt Col Jaswant Singh AIR 1994 P&H 111 (refd)

Nicholls v Ely Beet Sugar Factory Ltd [1936] Ch 343, CA (refd)

Philips v William Whiteley Ltd [1938] 1 All ER 566, KBD (refd)

Pinson v Lloyds & National Provincial Foreign Bank Ltd [1941] 2 KB 72, CA (refd)

Pioneer Shipping Ltd & Ors v BTP Tioxide Ltd [1982] AC 724, HL (refd)

Prism Leisure Sdn Bhd v Lumut Marine Resort Bhd [2002] 5 CLJ 391, HC (refd)

Ram Kishan & Ors v Mast Ram & Anor AIR 1986 P&H 61 (refd)

Ram Sarup Gupta (dead) by LRs v Bishun Narain Inter College & Ors AIR 1987 SC 1242 (refd)

Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong [1998] 32 MLJ 151; [1998] 3 CLJ 503, FC (refd)

Someshwar Dutt v Tribhawan Dutt & Anor AIR 1934 PC 130 (refd)

Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor [2006] 6 MLJ 229, CA (refd)
Tham Cheow Toh v Associated Metal Smelters Ltd [1972] 1 MLJ 171, FC (refd)
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd & Ors (2004) 219 CLR 165; (2004) 211 ALR 342, HC (refd)
United Malayan Banking Corporation Bhd v Aluminex (M) Sdn Bhd & Anor [1993] 3 MLJ 587, SC (refd)
Vinod Kumar Arora v Smt Surjit Kaur AIR 1987 SC 2179 (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

Contracts Act 1950 s 74
Evidence Act 1950 s 114(g)
Land Acquisition Act 1960 ss 2(1), 4(1), (3), 8, 10, 14(1), (2), 22, Forms A, D, E, K
National Land Code s 221, Form 5A
Rent Act 1968 [UK] s 18(5)

Pawancheek Marican (Suzilawati Ismail with him) (Wan Marican, Hamzah & Shaik) for the plaintiff.
Cecil Abraham (Dhinesh Baskaran and John Yap Mow Jiun with him) (Heng & Co) for the defendant.
Paul KW Kwong (Azman Davidson & Co) for the second defendant in the counterclaim.

Abdul Malik Ishak J (now JCA):

THE PARTIES

[1] For ease of reference, the parties will be referred to as follows:

(a) UDA Holdings Bhd is the plaintiff in the original action and it is the first defendant in the counterclaim and will hereinafter be referred to as 'UDA Holdings';

(b) Melewar Leisure Sdn Bhd is the defendant in the original action and it is the plaintiff in the counterclaim and it will be referred to hereinafter as 'Melewar'; and

(c) CH Williams Talhar & Wong Sdn Bhd is the second defendant in the counterclaim and will hereinafter be referred to as 'CH Williams'.

THE FACTS OF THE CASE

[2] UDA Holdings owns a piece of land held under HS(D) 50341 for PT No 1 and HS(D) 51859 for PT No 2 located at section 31, Bandar Kuala Lumpur, District of Wilayah Persekutuan ('land'). Originally on that land

stood a wet market. That wet market was subsequently re-developed by Melewar into a famous centre of culture and commerce — known locally as the Central Market and the Central Square.

[3] By way of a lease agreement dated 5 September 1989 ('the lease agreement'), UDA Holdings leased the land and the old building that housed the wet market ('the demised premises') to Melewar for a period of 75 years commencing from 20 April 1989. With the advantage of a long lease, Melewar developed the demised premises and turned it into the Central Market and the Central Square as alluded to earlier.

[4] The lease agreement can be seen at pp 5 to 17 of the common bundle and it was, pure and simple, a commercial transaction between UDA Holdings and Melewar. Briefly, by that lease agreement the parties agreed that:

(i) Melewar would re-develop all parts of the demised premises at its own costs and exclusively deal with the demised premises throughout the span of 75 years by sub-leasing, sub-letting or even give licences to third parties (see sections 2.03, 3.03(a) and 5.01(d) of the lease agreement);

(ii) in exchange for this special privilege, Melewar was required to make an up-front payment of RM25.36m to UDA Holdings (see section 3.01 of the lease agreement);

(iii) the sum of RM25.36m was duly paid by Melewar to UDA Holdings (see the evidence of Fadzidah bt Hashim (PW1) under cross-examination at p 5 of the notes of evidence); and

(iv) upon expiry of the lease agreement, Melewar would surrender the demised premises including all the buildings and structures built or developed by Melewar to UDA Holdings free of any payment or compensation (see section 3.03(a) of the lease agreement).

[5] On 23 July 1994, the government gave notice of its intention to compulsorily acquire part of the land under the Land Acquisition Act 1960 ('LAA') for the purpose of 'Projek Sistem Kedua Transit Aliran Ringan (LRT) untuk Kuala Lumpur' as reflected in Form 'A' of s 4(1) of the LAA at p 30 of the common bundle. And the gazette notification of such notification in compliance with s 4(3) of the LAA can be seen at pp 33 to 35 of the common bundle.

[6] On 26 October 1994, by way of Form 'D' issued pursuant to s 8 of the LAA as seen at pp 36 to 37 of the common bundle, the land administrator of Wilayah Persekutuan ('the land administrator') declared that approximately 1,774.29 square metres from the land owned by UDA

Holdings had been compulsorily acquired by the government. At the time of the acquisition, only six years had run on the lease, and Melewar still had 69 years left.

[7] On 23 December 1994, the land administrator by way of Form 'E' pursuant to s 10 of the LAA as reflected at pp 39 to 40 of the common bundle gave notice to UDA Holdings and Melewar that an enquiry would be held into claims for compensation arising from the acquisition.

[8] On 13 February 1995, the land administrator conducted the enquiry and this can be seen from the notes of evidence at pp 23 to 29 of the common bundle. The representatives from UDA Holdings, Melewar and the government attended the enquiry and gave evidence.

[9] During the enquiry, valuation reports of the parties were submitted to the land administrator. The first valuation report dated 28 April 1995 was from Messrs Khong & Jaafar Sdn Bhd ('K&J') and it was prepared for the benefit of Melewar. K&J supported Melewar's compensation claim for the sum of RM14,336,090. K&J's valuation report made reference to the fact that Melewar intended to develop the demised premises into a 252 rooms hotel with facilities like retail outlets, a restaurant, a cinema and a two level basement car park. According to K&J, the relevant approvals in principle had already been granted by the relevant authorities for this proposed development (see p 57 of the common bundle).

[10] A second valuation report dated 28 April 1995 prepared by K&J for the benefit of UDA Holdings in support of the latter's compensation claim to the tune of RM382,157 can be seen at pp 44 to 131 of the common bundle in particular at p 111. It must be borne in mind that UDA Holdings only claimed this amount as compensation and this was admitted by Fadzidah bt Hashim ('PW1') at p 7 of the notes of evidence when she was being cross-examined.

[11] The third valuation report dated 29 June 1995 by the government valuer can be seen at pp 132 to 140 of the common bundle and at p 140 thereof the government valuer proposed compensation of RM942,178 in favour of UDA Holdings and the sum of RM8,465,693 in favour of Melewar.

[12] During the enquiry before the land administrator, the lease agreement was not tendered as evidence by any party and because of this learned counsel for UDA Holdings argued that the legal effect of the lease agreement in regard to the apportionment of the compensation monies was not canvassed

by any party before the land administrator. Paragraph 11 of the agreed facts in the bundle marked as 'E' would support the submission of learned counsel for UDA Holdings on this point.

[13] While acknowledging that the lease agreement was not tendered as evidence before the land administrator, learned counsel for Melewar emphasised that there can be no doubt that all the parties concerned, including the land administrator, were fully aware of the lease agreement and its provisions thereto.

[14] Learned counsel for Melewar argued along the following lines:

(i) that UDA Holdings and Melewar were certainly aware of the provisions of the lease agreement because they were parties to it;

(ii) that UDA Holdings' witness during the enquiry by the name of Ismail Bolhassan was the manager of UDA Holdings valuation and property sections as seen from the witness statement of Fadzidah bt Hashim ('PW1') at p 17 at Q and A 12 of bundle 'I', and it was emphasised that that gentleman was no novice in these matters;

(iii) that the lease was a registered lease under Form 5A pursuant to s 221 of the National Land Code ('NLC') as seen at pp 1–4 of the common bundle and that being the case the lease agreement formed part and parcel of the records of the land office and this was admitted by Fadzidah bt Hashim (PW1) under cross-examination as seen at p 7 of the notes of evidence;

(iv) that the lease agreement expressly referred to all the three valuation reports and the government valuer's report specially stated that a sum of RM25.36m was paid by Melewar to UDA Holdings as reflected at p 139 of the common bundle and this fact too was admitted by Fadzidah bt Hashim ('PW1') under cross-examination at p 9 of the notes of evidence as a piece of information that could readily be obtained by the government valuer by referring to the lease agreement; and

(v) that the lease agreement was expressly referred to by the representatives of UDA Holdings and Melewar when they testified at the enquiry (see p 26 of the common bundle).

[15] On 9 November 1995, at the enquiry held by the land administrator and after hearing the evidence of the witnesses from both sides, the land administrator made the following awards:

(i) that the sum of RM382,157 would be paid to UDA Holdings as the lessor of the land;

(ii) that the sum of RM8,461,393 would be paid to Melewar as lessee out of which the sum of RM7,199,840 was for the land and the sum of RM1,261,553 was for the depreciation in the value of the land in question; and

(iii) that the sum of RM5,000 was for UDA staff cooperative society as a tenant of the land.

[16] The awards of the land administrator came with interest at the rate of 8%pa commencing on the date of the issuance of Form 'K' (being the date of the acquisition of the land). And Form 'K' was issued on 12 April 1995 pursuant to s 22 of the LAA as seen at p 198 of the common bundle.

[17] On 29 November 1995, Melewar referred their objections against the award to the High Court.

[18] On 15 December 1995, UDA Holdings referred their objections against the award to the High Court.

[19] On 12 February 1996, Melewar collected their compensation of RM8,461,393 from the land administrator.

[20] On 11 September 2000, the plaintiff withdrew its reference to the High Court.

[21] On 24 May 2001, UDA Holdings filed this action against Melewar in order to obtain the distribution of compensation under the award based on section 9.01(c) of the lease agreement.

[22] On 15 October 2001, Melewar filed its statement of defence against UDA Holdings' claim and at the same time Melewar counterclaimed against UDA Holdings and CH Williams Talhar & Wong Sdn Bhd ('CH Williams').

[23] At the reference proceedings before the High Court, Melewar entered into a consent judgment with the government wherein Melewar agreed to accept the additional compensation of RM947,974 awarded by the government. Out of this sum, a sum of RM896,774 was for the value of the land while a sum of RM51,200 was for the improvement and renovation works and such payment was required to be settled within three months of the extract of the sealed copy of the consent order.

[24] On 11 January 2001, UDA Holdings wrote a letter to the Department of Land and Mines and sought compensation of the sum of RM382,157 and

for the return of the deposit of RM1,500 but, until to date, the compensation sum and the deposit have not been received by UDA Holdings as the plaintiff.

[25] Basically, a dispute arose between UDA Holdings and Melewar in regard to the apportionment of the acquisition award and, according to the agreed facts as seen at para 14 of p 8 of bundle 'E', both the parties had on 3 November 1997 agreed to appoint licensed valuers CH Williams to re-value the quantum and distribution of the compensation monies to the parties.

[26] In UDA Holdings' letter dated 8 November 1997 to Melewar as seen at pp 185–187 of the common bundle, UDA Holdings said that 'as discussed and agreed', CH Williams would be appointed 'for the purpose of re-evaluating the quantum and distribution of compensation due to each party' payable by the state authority. In serious vein, the letter further added that 'the basis of the parties' entitlement' would also be determined and that the parties 'agree to be bound by any such determination'. By way of a conclusion, the letter stipulated that the valuers would also be asked to determine 'the interests of both parties' as provided for in the lease agreement. It is interesting to note that this letter was signed by Normala Harun for UDA Holdings (see p 186 of the common bundle) and by Nicholas John Lough @ Sharif Clough Abdullah ('DW1') for Melewar (see p 187 of the common bundle).

[27] With that kind of understanding in place, CH Williams on 13 November 1997 issued a letter as seen at pp 189 to 190 of the common bundle stipulating the scope of work as follows:

(1) To advise on the heads of claims, allowable under the Compulsory Acquisition Act in respect of the compulsory acquisition of the subject property for the combined interests of the lessor and the lessee.

(2) To identify the interests of the lessor and the lessee.

[28] The second part of the scope of work of CH Williams was later amended following a request by UDA Holdings on 18 November 1997 by way of a letter as seen at p 334 of the common bundle and by that letter the parties agreed to revise the second part of the scope of work to read as follows:

(1) To identify the interests of the lessor (UDA Holdings) and the lessee

(Melewar) in accordance with the provisions of the lease agreement dated 5 September 1989 in particular in Article IX on Compulsory Acquisition.

[29] On 8 December 1992, CH Williams completed its valuation report and that report can be seen at pp 341–346 of the common bundle. The conclusion of CH Williams' valuation report at p 346 of the common bundle was worded in this fashion:

Conclusion

(1) The Land Acquisition Act provides for compensation to an interested party. The Lessee is an interested party.

(2) The legal rights of the Lessor and Lessee are well defined. On the norm, the proportionate value of the Lessor's interest is very small. (The property has been 'sold' for the next 69 years).

(3) Article IX defines the apportionment of the compensation. As stated above the Lessee's share of the compensation could be 0 (zero) or at best a small percentage. The whole land value of RM7,581,997.00 goes to the Lessor.

(4) Sharing the award based on Paragraph C is an unsolicited view of the undersigned.

[30] Paragraph 'C' of CH Williams' valuation report which constituted the unsolicited view of Abdul Halim bin Othman, the signatory to the valuation report, can be seen at p 345 of the common bundle and it was worded in this manner:

The Award

The Award for the land as stated in Borang 'H' is as follows:

1.	Pemilik Tanah:	RM 382,157.00
2.	Pemegang Pajakan:	RM7,199,840.00
		RM7,581,997.00

The proportion of the Lessor's share is 5.04% of the total land value. This is a fair percentage.

The land administrator has also awarded RM1,261,553 for the dimunition in value of the balance land. On this approach the value of the Lessor's interest (the reversion) will be affected.

Taking the same percentage, the drop in value of the Lessor's interest is as follows:

5.04% x 1,261,553.00 = RM63,582.00

Therefore total compensation to Lessor is RM445,739.00

(RM382,157 + RM63,582).

Melewar refused to accept the decision of CH Williams and in Melewar's letter dated 19 February 1998 to UDA Holdings as seen at pp 350–351 of the common bundle, Melewar categorically registered its disagreement at para 3 of the said letter in the following words:

> We regret to state that we are truly unable to agree with the opinion of WTW. In the said opinion, it appears clear that WTW had unsolicitously undertaken to legally interpret the provisions in the Lease Agreement, a task which you will no doubt agree, be best left with the lawyers. In fact, the basis of WTW's opinion rest on their interpretation of clause 9.01(c) of the Lease Agreement and not on their valuation of the loss of parties arising from the acquisition.

THE CONTENTIONS OF UDA HOLDINGS AND MELEWAR IN THE ORIGINAL ACTION

[31] UDA Holdings argued that Melewar had agreed to abide by CH Williams' opinion and since CH Williams had interpreted section 9.01(c) of the lease agreement in favour of UDA Holdings and concluded that Melewar's compensation should be paid to UDA Holdings, Melewar has no choice but to comply.

[32] Running in opposite direction was Melewar's defence and that was that Melewar was not bound to comply with CH Williams' opinion for the following reasons:

(i) that Melewar did not agree to be bound by CH Williams' opinion;

(ii) that Melewar's agreement, if any, to be bound by CH Williams' opinion was subject to UDA Holdings issuing an irrevocable confirmation letter and since the confirmation letter was revoked by UDA Holdings, Melewar does not have to comply with CH Williams' opinion;

(iii) that CH Williams' opinion exceeded its scope of work; and

(iv) that the interpretation of section 9.01(c) of the lease agreement by CH Williams was plainly wrong.

ANALYSIS

[33] I am asked to interpret section 9.01(c) of the lease agreement in the context of whether UDA Holdings is entitled to the whole compensation award save for the 'actual cost' incurred by Melewar in the improvements and

renovations made to the old buildings and structures. For convenience, section 9.01(c) of the lease agreement is now reproduced herein:

> Section 9.01
>
> In the event of the government or such other acquiring authority or authorities having power in that behalf at any time during the term hereby created acquiring the Demised Premises or any part thereof:
>
> (c) Upon receipt of the award from the acquiring authority the lessor (UDA Holdings) shall pay to the lessee (Melewar) from such award a sum of equivalent to the actual cost incurred by the lessee (Melewar) in the improvements and renovations of the old buildings and structures and the balance of the award shall belong to the lessor (UDA Holdings) absolutely.

[34] The stand of UDA Holdings can be seen at para 29 of its statement of claim. It is this. That UDA Holdings is entitled to receive from Melewar all compensation monies for the affected land amounting to RM8,096,614 that was paid by the land administrator to Melewar subject to the deduction of the actual costs incurred by Melewar in carrying out the renovations and improvements to the demised premises wherein Melewar will have to prove the costs thereof.

[35] Paragraph 10 of UDA Holdings statement of claim states categorically that section 9.01(c) of the lease agreement provides that immediately upon receipt of the award from the government or the acquiring authority the plaintiff (UDA Holdings) shall pay to the defendant (Melewar) from such award a sum of equivalent to the actual costs incurred by the defendant (Melewar) in the improvements and renovations of the demised premises and the balance of the award shall belong to the plaintiff (UDA Holdings) absolutely.

[36] Other relevant averments were also made in UDA Holdings statement of claim and that can be seen at pp 16–23 of the bundle of pleadings and I need not reproduce them in verbatim. Suffice for me to say that UDA Holdings statement of claim are properly framed for the benefit of the parties as well as for the court (*Pinson v Lloyds & National Provincial Foreign Bank Ltd* [1941] 2 KB 72).

[37] In fact, the parties herein have filed their pleadings in an orderly manner and I am grateful for that. It is said that intemperate or vituperative epithets or scandalous, frivolous or vexatious allegations against the opponents are not encouraged when drafting pleadings. A lawyer must not forget his duty to the profession to which he belongs and he must always

employ civil words in drafting pleadings. Moderation is always encouraged and moderation in language is now the hallmark of proper pleadings.

[38] The rules of pleadings are intended to regulate the business and procedures of the court. These rules can never create new legal rights where none exist nor can they take away the existing rights.

[39] According to the authorities, the whole object of pleading is to give fair notice to each party of what the opponent's case is all about and at the same time to ascertain, with precision, the points on which the parties agree and those on which they differ (*Someshwar Dutt v Tribhawan Dutt & Anor* AIR 1934 (Vol 21) PC 130; *Ram Sarup Gupta (dead) by LRs v Bishun Narain Inter College & Ors* AIR 1987 (Vol 74) SC 1242; *Narinder Nath (deceased by LRs), Petitioner v Lt Col Jaswant Singh* AIR 1994 (Vol 81) P&H 111; and *Ganesh Trading Co v Moji Ram* AIR 1978 (Vol 65) SC 484). Another well known purpose of pleading is to eradicate irrelevancy.

[40] To achieve a fair trial, it is imperative that the party should state the essential facts so that the other party may not be taken by surprise (*Ram Sarup Gupta (dead) by LRs v Bishun Narain Inter College & Ors*; *K Kanakarathnam v A Perumal & Anor* AIR 1994 (Vol 81) Mad 247 (DB); and *Ram Kishan & Ors v Mast Ram & Anor* AIR 1986 (Vol 73) P&H 61 (DB)).

[41] Now, in its statement of defence at para 21.4 of the bundle of pleadings, Melewar states that '*section 9.01(c) of the lease agreement does not apply to compensation paid to Melewar in its own right as a lessee and hence CH Williams conclusions are in any event plainly wrong*'. And Melewar's stand on this issue is reflected in the question posed by the learned counsel for Melewar which was duly denied by Abdul Halim bin Othman under cross-examination at p 51 of the notes of evidence:

> Q: Section 9.01(c) merely refers to the receipt of the award by the lessor and the deduction in respect of improvements and renovations and does not refer to apportionment of compensation in respect of distinctive award?
>
> A: I disagree.

[42] Learned counsel for UDA Holdings submits that by virtue of section 9.01(c) of the lease agreement, UDA Holdings and Melewar have agreed to change the compensation formula in that the whole compensation under the compensation award would benefit UDA Holdings whereas Melewar is only entitled to be paid the actual costs incurred by it in the improvements and renovations of the old buildings and structures on the land. It must be borne

in mind that in the absence of section 9.01(c) of the lease agreement, the provisions of the LAA would apply and the compensation monies under the award would go to the 'persons interested'. Section 2(1) of the LAA defines a 'person interested' to include:

> ... every person claiming an interest in compensation to be made on account of the acquisition of land under this Act, but does not include a tenant … at will.

[43] I must accord commercial efficacy in interpreting section 9.01(c) of the lease agreement. The core dispute between the parties here revolve on the interpretation of a commercial contract. It cannot be denied that in commercial contracts the reasonabless of any particular construction is a relevant consideration in choosing between rival constructions. What Lord Reid said in *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (HL) at p 251 rings true in this case. This was what His Lordship said:

> The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.

[44] The statement of claim of UDA Holdings makes specific reference to sections 9.01(a) and 9.01(b) of the lease agreement. Section 9.01(a) of the lease agreement provides that if the demised premises or any part thereof is acquired by the government or any acquiring party during the period of the lease, UDA Holdings as the plaintiff shall immediately, upon receipt of any notification of acquisition of the land, inform Melewar as the defendant in writing and immediately notify the government or the acquiring authority of UDA Holdings' interest in the demised premises. And section 9.01(b) of the lease agreement provides that in the event that either party whether UDA Holdings as the plaintiff or Melewar as the defendant is not satisfied with the amount of compensation awarded by the government or the acquiring authority, UDA Holdings as the plaintiff or Melewar as the defendant may institute the necessary proceedings for greater award to be paid by the government or the acquiring authority and UDA Holdings as the plaintiff and Melewar as the defendant shall assist each other for such purpose.

[45] We must be pragmatic. Once the notification of acquisition as per Form 'A' of the LAA is received by UDA Holdings as the lessor, UDA Holdings shall immediately inform Melewar who is the lessee. The objective of such an exercise is quite obvious. Both the parties may then make the necessary representations to the relevant authorities by informing same of their respective interests in the acquisition proceedings. If that is not done then the apportionment of the compensation award will lead to an unreasonable result.

[46] I have earlier summarised the contents of Normala Harun's letter dated 8 November 1997 and she wrote that letter in her capacity as the legal officer of UDA Holdings and that letter was addressed to Melewar. That letter must be closely examined and placed in its correct perspective. In interpreting that letter, I am entitled to look at the circumstances surrounding Melewar's agreement to appoint CH Williams in determining the true intent of the parties. Support for this proposition can be found in the judgment of Edgar Joseph Jr SCJ in *United Malayan Banking Corporation Bhd v Aluminex (M) Sdn Bhd & Anor* [1993] 3 MLJ 587, a decision of the Supreme Court. There at p 602, His Lordship had this to say:

> In our view, the assignment, like any other document, must be construed reasonably; it must be construed not only by the words used but also with due regard to the surrounding circumstances, (see s 92(f) of the Evidence Act 1950), not forgetting the other contemporary documents.

That was the approach adopted by Lord Wilberforce in *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989; [1976] 3 All ER 570, when he said [at p 995]:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

And, he continued [at p 997]: … what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were.

[47] And in interpreting Normala Harun's letter dated 8 November 1997, I have to interpret the intention of the parties not by reference to the force of a single expression but rather by viewing the letter in question as a whole. I have laid down this principle in a comprehensive manner in the case of *Prism Leisure Sdn Bhd v Lumut Marine Resort Bhd* [2002] 5 CLJ 391. At pp 408–409, this was what I said:

> Now, these two letters must be read and interpreted as a whole in order to extract the meaning behind them. This was also the approach that was adopted by Salmon LJ in *East Ham Corporation v Sunley* [1965] 1 WLR 30 at p 43 which was affirmed on appeal vide [1966] AC 406 and this was what his Lordship said:
>
> > We have been referred to a number of well-known rules of construction. Many of these rules are artificial, some are contradictory and none is more than a guide, sometimes an uncertain one, for ascertaining the true intention of the parties as expressed in the document under consideration. The principle, however, long ago laid down by Lord Ellenborough CJ in *Barton v Fitzgerald* [1812] 15 East 530 at p 541 is of the greatest value. … the sense and meaning

> of the parties in any particular part of an instrument may be collected *ex antecedentibus et consequentibus* (ie, from what goes before and from what follows); every part of it may be brought into action in order to collect from the whole one uniform and constant sense, if that may be done.

Lord Davey in *NE Ry v Hastings* [1900] AC 260 at p 269 quoted with approval the speech of Lord Watson in *Chamber Colliery Co v Twyerould [1893]* which was reported in [1915] 1 Ch 268 n at p 272 and there Lord Davey aptly said:

> The deed must be read as a whole in order to ascertain the true meaning of its several clauses and that the words of each clause should be so interpreted as to bring them into harmony with the other provisions of the deed if that interpretation does no violence to the meaning of which they are naturally susceptible.

and in the context of the present case, I did just that and I gave the meaning to the words employed in the letter of offer and the letter of acceptance without doing violence to the meaning which those words are naturally susceptible to. Of course, the intention of the parties can be discerned not by inferring from the force of a single expression but rather by viewing the whole instrument as a whole. In this context, the speech of Leach VC in *Hume v Rundell* [1824] 2 S & S 174 at p 177 would certainly be apt to reproduce:

> In the construction of all instruments it is the duty of the court not to confine itself to the force of a particular expression but to collect the intention from the whole instrument taken together. But a court is not authorised to deviate from the force of a particular expression unless it finds in other parts of the instrument expressions which manifest that the author of the instrument could not have the intention which the literal force of a particular expression would impute to him. However capricious may be the intention which is clearly and unequivocally expressed, every court is bound by it unless it is plainly contradicted by other parts of the instrument.

I am certainly in favour of upholding bargains between the two parties. I have examined the two letters that passed between the two parties and I was unable to find any reason to show that the parties did not intend that there should not be a concluded contract until a formal agreement had been executed by them. Indeed the objective intention of the parties showed that they were bent on entering a concluded contract. Lord Wright in *Hillas & Co Ltd v Arcos Ltd* [1932] All ER (Rep) 494 was in favour of upholding contractual bargains between two parties and this was what His Lordship said:

> Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business, may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being, too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not

A mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as (a) matter of machinery where the contractual intention is clear but the contract is silent on some detail.

B

I am in total agreement with the speech of Lord Wright in *Hillas & Co Ltd v Arcos Ltd* and, for the moment, I have nothing further to add.

C **[48]** Lord Bingham of Cornhill in *Bank of Credit and Commerce International SA (in liquidation) v Ali & Ors* [2001] 2 WLR 735 at p 739 summarised the principles in these erudite terms:

D To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties. To ascertain the parties' intentions the court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified.

E

[49] The High Court of Australia (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ) in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd & Ors* (2004) 219 CLR 165; (2004) 211 ALR 342 at p 179 aptly said:

F References to the common intention of the parties to a contract are to understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the

G text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction (*Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at pp 461–462).

H **[50]** Lord Steyn writing a separate judgment for the House of Lords in the case of *Equitable Life Assurance Society v Hyman* [2000] 3 All ER 961; [2002] 1 AC 408, spoke of the need to assign the meaning of the words in an appropriate manner (see p 970):

I The purpose of interpretation is to assign to the language of the text the most appropriate meaning which the words can legitimately bear.

[51] Continuing at the same page, in the same case, Lord Steyn had this to say:

The process 'is one of construction of the agreement as a whole in its commercial setting': *South Australia Asset Management Corp v York Montague Ltd*, *United Bank of Kuwait Plc v Prudential Property Services Ltd*, *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365 at p 371; [1997] AC 191 at p 212, per Lord Hoffmann.

[52] Again, Lord Steyn writing a separate judgment for the House of Lords in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 gave prominence to the business common sense approach in interpreting a commercial contract. This was what His Lordship said at pp 770–771 of the report:

It is better to speak of a shift towards commercial interpretation. About the fact of the change in approach to construction there is no doubt. One illustration will be sufficient. In *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201, Lord Diplock in a speech concurred in by his fellow Law Lords observed:

> ... if detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language. In contradistinction to this modern approach Lord Greene MR's judgment in *Hankey v Clavering* [1942] 2 KB 326 is rigid and formalistic. Nowadays one expects a notice to determine under a commercial lease to be interpreted not as a 'technical document' but in accordance with business common sense: see *Micrografix v Woking 8 Ltd* [1995] 2 EGLR 32. After all, there is no reason whatever why such a document must be drafted by a lawyer. Qualitatively, the notices are of the same type as notices under charter parties and contracts of affreightment. Such notices, even if they entail the exercise of important options, are habitually drafted by commercial men rather than lawyers. It would be a disservice to commercial practice to classify such notices as technical documents and to require them to be interpreted as such. Nowadays one must substitute for the rigid rule in *Hankey v Clavering* the standard of a commercial construction.

[53] I will now reproduce verbatim Normala Harun's letter dated 8 November 1997:

DISTRIBUTION OF COMPENSATION DUE ON ACQUISITION OF PART OF THE LAND AT THE CENTRAL MARKET KUALA LUMPUR BETWEEN UDA HOLDINGS SDN. BHD. AND MELEWAR LEISURE SDN. BHD.

As discussed and agreed during our meeting on 3 November, 1997, we are pleased to advise that we are agreeable to the appointment of another independent valuer for the purpose of re-evaluating the quantum and distribution of compensation due to each party subject to the following:

1. The independent valuer, Messrs Williams, Talhar and Wong shall be jointly appointed by both parties. However, UDA shall issue the letter of appointment, the terms of reference contained therein shall be subject to MLSB's agreement.

2. The costs of valuation shall be borne equally by the parties.

3. The basis of the parties' entitlement shall be determined by the valuer and the parties agree to be bound by any such determination. In the event the aggregate of the quantum of compensation as determined by the valuer shall exceed or be less than the amount of compensation actually awarded by the state authority, then the amount actually due to each party shall be calculated proportionately based on the ratio of the quantum as determined by the valuer. For the avoidance of doubt, append below (is) the example of such calculation:

EXAMPLE

In the event the compensation is valued at RM15 million of which MLSB is entitled to RM10 million and UHSB is entitled to RM5 million. However, the actual compensation (awarded) by the state authority is only RM9 million. In such instance, the actual amount to be distributed between each party shall be as follows:

MLSB's entitlement:	RM10 million/ RM15 million	x RM9 million =	RM6 million
UHSB's entitlement:	RM 5 million / RM15 million	x RM9 million =	RM3 million

4. The interests of both parties as accorded in the provisions of the Lease Agreement dated 5 September, 1989 in particular Article IX on Compulsory Acquisition shall be taken into consideration at the time of such valuation by Messrs Williams, Talhar and Wong.

If you (are) agreeable to the above, kindly signify your agreement by signing and returning to us the duplicate of this letter so as to enable us (to) proceed with the necessary.

Learned counsel for Melewar submits that when one examines the factual matrix surrounding Normala Harun's letter and after reading the contents of that letter, it becomes obvious that Melewar and UDA Holdings agreed to appoint CH Williams in order to obtain a second opinion on the quantum of the compensation payable to each party and nothing more.

[54] Flowing from that it is argued that what Melewar agreed to be bound was the second opinion of CH Williams on the quantum or value of the compensation received by each party and not CH Williams' determination of each party's right to receive compensation.

[55] The witness statement of Fadzidah bt Hashim ('PW1') at question 31 of p 22 of bundle 'I' merits reproduction. There she said:

Q: In this case, the valuers, CH Williams Talhar & Wong (CH Williams) was made the second defendant in the counterclaim of Melewar. What was the role of CH Williams?

A: CH Williams was appointed to study and give a Second Opinion on the distribution of the compensation sum that has been awarded to the parties by the land administrator after Melewar had asked UDA to confirm to Central Market Development Sdn Bhd that Melewar had complied with the terms of the Lease dated 5/9/1989 to enable Melewar to be listed on the Second Board of the Kuala Lumpur Stock Exchange. The letter dated 12/8/1997 is found at p 359 of the C/B.

[56] And Sharif Lough bin Abdullah ('DW1') under cross-examination at p 26 of the notes of evidence consistently maintained his unwavering stand that:

> I confirm that that was our commitment based on the valuation exercise being the second opinion of the first valuation.

[57] Again, under under cross-examination, Sharif Lough bin Abdullah (DW1) at p 29 of the notes of evidence categorically stated that:

> CH Williams was appointed to give a second opinion of the valuation of Khong & Jaafar. That was the spirit and understanding between us.

[58] Finally, Abdul Halim bin Othman (DW1 — in Melewar's counterclaim) under cross-examination at p 36 of the notes of evidence admitted that:

> I have been asked to give a second opinion (memberi pandangan kedua) with regard to the distribution of compensation which was made by the Jabatan Tanah Wilayah.

[59] Relying on these strands of evidence Melewar says that both the parties — referring to Melewar and UDA Holdings, had only agreed to the

A appointment of CH Williams to give a second opinion on the value of the compensation received by each party. That, according to Melewar, was the scope and extent of the agreement.

[60] Melewar argues that the parties never agreed to appoint CH Williams B to re-visit the parties respective legal rights as to who should actually receive the compensation in the first place. Melewar further argues that the interpretation of section 9.01(c) of the lease agreement falls within the province of the lawyers employed by the parties and not that of CH Williams — the chartered surveyors and property consultants.

C

[61] Indeed Sharif Lough bin Abdullah ('DW1') in his examination-in-chief at p 24 of the notes of evidence testified that:

> It was never my understanding that CH Williams was making a legal interpretation D of section 9.01(c).

[62] And under cross-examination Sharif Lough bin Abdullah ('DW1') at p 29 of the notes of evidence testified that:

E

> We did not agree and never in our mind that CH Williams would make a legal interpretation of the documents because that would be the job of the lawyer.

[63] Further cross-examination of Sharif Lough bin Abdullah ('DW1') at F p 31 of the notes of evidence re-iterated the same sentiment:

> ... as a layman if I want to seek a legal interpretation of any document, I would go to a lawyer.

G

[64] Sharif Lough bin Abdullah's testimony in regard to his understanding of the precise scope of CH Williams' appointment and the true intention of the parties was not challenged by UDA Holdings either in cross-examination or by producing witnesses who had attended the meeting on 3 November H 1997 as alluded to in Normala Harun's letter. And in the absence of any contrary evidence, Sharif Lough bin Abdullah's evidence as to the precise scope of CH Williams' appointment remain uncontroverted and unchallenged. On the failure to cross-examine. I have this to say in *Capital Corp Securities Sdn Bhd v Abdul Malek Beh bin Abdullah* [2005] 7 MLJ 35 at I p 49:

> It is only right and proper that witnesses should be challenged in the witness box so that it is announced to the whole world at large, so to speak, that the evidence tendered has been challenged and is not accepted. When the opponent has declined to put his essential and material case in cross-examination, just like the

present case at hand, then it must follow as the night the day that he believed the testimony that has been given and that he could not dispute that evidence at all (*AE Carapiet v AY Derderian* [1961] Cal 359). A

[65] But that doesn't bar me from interpreting section 9.01(c) of the lease agreement. I must, however, put in the forefront of my mind that the overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean. So, if in spite of linguistic problems the meaning is clear, it is that meaning which must prevail. B C

[66] The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition. It is rather difficult to accept that people who enter into written contracts have made linguistic mistakes. And in interpreting the written contracts, the law does not require judges to attribute to the parties an intention which they plainly could not have had. But it is the duty of the court to give effect to the language employed even though the consequences may appear harsh for one side or the other. D E

[67] I have perused through sections 9.01(a) and 9.01(b) of the lease agreement and I must categorically say that at the conclusion of the acquisition proceedings, the intention of the parties was that UDA Holdings as the lessor and being the registered proprietor of the freehold demised premises — to whom the right of reversion exist upon expiry of the lease agreement, shall be the rightful party to receive the compensation monies by virtue of the compulsory acquisition of some part of the land under the LAA by the government. F

[68] And whatever may be the quantum of the award received from the government, UDA Holdings and Melewar have expressly agreed in para (c) of section 9.01 of the lease agreement that out of that sum, Melewar as the lessee shall be reimbursed the 'actual cost' of renovations and improvements. Of course, after deducting the 'actual cost' previously incurred by Melewar as the lessee, whatever remains 'shall belong to the lessor absolutely' — meaning to UDA Holdings. G H

[69] It cannot be denied that the powers of the land administrator are laid down in the LAA in the context of a land acquisition exercise. But that cannot prevent UDA Holdings and Melewar to agree between themselves as to how an acquisition award is to be shared between themselves. It is my judgment that if proper representations have been made to the land administrator at the enquiry in regard to the relevant provisions of the lease agreement in particular section 9.01(c) thereof, then the land administrator I

acting in good conscience would in all probabilities make the necessary awards in accordance with the lease agreement.

[70] Learned counsel for Melewar in cross-examining Abdul Halim bin Othman ('DW1', in Melewar's counterclaim against UDA Holdings and CH Williams) placed a great deal of emphasis on whether the word 'award' that appears in section 9.01(b) of the lease agreement refers to one award or two awards (see pp 41–45 of the notes of evidence). The answer to this simple issue can be resolved by looking at s 14(1) and 14(2) of the LAA, and I shall now reproduce them verbatim:

> 14 Award of the Land Administrator.
>
> (1) Upon the conclusion of the enquiry under section 12 relating to any scheduled land the Land Administrator shall prepare a written award under his hand in Form G, in which he shall, in respect of each separate area of scheduled land, make a separate award in respect of each person whose interest in the land has been established in such enquiry.
>
> (2) Every award prepared under subsection (1) shall be filed in the office of the Land Administrator and shall be final and conclusive evidence of the area of any scheduled land, of its value in the opinion of the Land Administrator, and of the apportionment of the compensation awarded by the Land Administrator, whether the persons interested therein have or have not appeared at the enquiry.

[71] The land administrator on the strength of s 14(1) of the LAA is entitled to give a 'separate award' in respect of each separate area of the scheduled land — in the sense that there can be more than one award. And this is limited to a situation where there are separate areas of scheduled land with different prices having different interests.

[72] But, unfortunately, this is not the case here. There is only one parcel of the scheduled land here with three different interests. At the enquiry before the land administrator, three different interests were identified, namely:

(i) the lessor's interest and that would be UDA Holdings' interest;

(ii) the lessee's interest and that would be Melewar's interest; and

(iii) the interest of the tenant and that would be UDA Staff Cooperative Society.

[73] Under s 14(1) of the LAA, only one award is envisaged and such an award is subject to an apportionment of compensation among parties with

different interests in the scheduled land. Section 14(2) of the LAA also refers to one award only. A perusal of section 9.01(c) of the lease agreement would show that the word 'award' that appears therein does not run counter nor is inconsistent with the meaning of the word 'award' as envisaged in s 14(1) and 14(2) of the LAA.

[74] All these would show that by virtue of section 9.01(c) of the lease agreement both the parties, namely UDA Holdings (lessor) and Melewar (lessee) have agreed that the whole benefit of the compensation award arising thereunder should go to UDA Holdings (lessor) while Melewar (lessee) is entitled to be paid the 'actual costs' for improvements and renovations to the scheduled land.

[75] The cross-examination of Abdul Halim bin Othman (DW1 in the counterclaim) by learned counsel for UDA Holdings showed that under section 9.01(c) of the lease agreement two interests are envisaged and that the whole award would go to UDA Holdings as the lessor while Melewar as the lessee is entitled to the claim of the actual costs incurred by Melewar in respect of the improvements and renovations. The evidence of Abdul Halim bin Othman (DW1 in the counterclaim) under cross-examination can be seen at pp 52–53 of the notes of evidence and they read as follows:

Q: Do you agree with me from a plain reading of section 9.01(c) of the lease agreement that there are two interests indicated here?

A: Yes.

Q: The first is the interest of the lessee to the actual costs as defined here?

A: That is correct.

Q: Do you agree that by virtue of the last two sentences 'the balance of the award shall belong to the lessor absolutely' means that the lessor also has an interest here?

A: That is correct.

Q: Bundle 'E' shown at para 11 English version. Do you agree that in the context of article 9 section 9.01(c) provides for apportionment of award?

A: That's correct. Page 346 of bundle 'G' shown at para 3 read.

Q: When you refer to zero or at best at a small percentage, are you referring to the costs provision in section 9.01(c)?

A: Yes.

Q: You put a zero here because you have no way of computing the costs at the time of preparing the report?

A: Yes.

Q: When you said that 'the whole land value of RM7,581,997 goes to the lessor' you were referring to the final part of section 9.01(c) of the lease agreement?

A: Yes, I agree.

Q: Your conclusion at page 346 in regard to the apportionment comes within your scope of work as discussed earlier?

A: That is correct.

[76] It cannot be denied that the answers of Abdul Halim bin Othman (DW1 in the counterclaim) sufficiently explains the meaning of section 9.01(c) of the lease agreement especially the phrase, 'upon receipt of the award from the acquiring authority the lessor shall pay to the lessee from such award … The effect of section 9.01(c) of the lease agreement may be stated as follows:

(i) that the word 'award' that appears in section 9.01(c) of the lease agreement refers to the compensation monies under the award;

(ii) that there is only one award as envisaged under section 9.01(c) of the lease agreement and it is consistent with the meaning of the word 'award' in s 14 of the LAA;

(iii) that the whole of the compensation monies under the award as stipulated in section 9.01(c) of the lease agreement is for the benefit of UDA Holdings as the lessor;

(iv) that Melewar as the defendant and the lessee is merely entitled to be paid a sum of money from the compensation monies by way of deduction for improvements and renovations of the old buildings and structures; and

(v) that after the necessary deduction for the 'actual cost' is made for the benefit of Melewar as the defendant lessee, the balance of the award shall belong to UDA Holdings as the plaintiff lessor.

[77] According to learned counsel for Melewar, section 9.01(c) of the lease agreement does not apply to compensation paid to Melewar in its own right as a lessee. With respect, such a submission would bring about absurdity or inconsistency in the interpretation of section 9.01(c) of the lease agreement. I am of the considered view that the words in section 9.01(c) of the lease agreement are not ambiguous. They are clearly worded and they should be given their natural and ordinary meaning. It is a common sense approach

because according to Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, at p 913: A

> … we do not easily accept that people have made linguistic mistakes, particularly in formal documents.

B

[78] I would accordingly hold that UDA Holdings is entitled to the whole award save for the amount in respect of the 'actual cost' incurred by Melewar.

[79] In regard to the issue of whether Melewar as the lessee had incurred actual costs in the improvements and renovations made to the old buildings and structures, I have this to say. C

[80] The onus is on Melewar to give details of the actual costs incurred by Melewar in the improvements and renovations made to the old buildings and structures and, according to UDA Holdings, Melewar has failed to do so. D

[81] Melewar questions the accuracy of the report of Hashim bin Ismail (PW2) of Tetuan Hashim & Lim for the following reasons:

E

(i) that he was not involved in the development of the Central Market and the Central Square from the beginning and therefore it was argued that he has no direct knowledge of the issues that surfaced;

(ii) that his report was prepared rather late in the day, to be precise more than 15 years after the event; F

(iii) that he did not have all the documents because Melewar also did not have all the documents since it was very difficult for Melewar to locate the documents given the considerable lapse of time that had elapsed;

(iv) that UDA Holdings' solicitors did not ask Melewar's solicitors for all the documents; and G

(v) that Melewar's costs are incurred on a continuous basis.

[82] By way of a letter dated 21 February 2001 as reflected at p 355 of the common bundle, UDA Holdings had asked Melewar to give details of the 'actual cost' incurred by Melewar in the improvements and renovations made to the old buildings and structures. But, unfortunately, Melewar through its reply dated 18 April 2001 as seen at p 356 of the common bundle refused to do so. However, at p 367 of bundle 'H', Melewar's solicitors had sent some documents for costing. H I

[83] The failure of Melewar to submit any estimate or calculations of the actual costs incurred in the improvements and renovations made to the old

buildings and structures for the purpose of the trial prompted UDA Holdings to appoint a practising quantity surveyor in the person of Hashim bin Ismail (PW2) to do the calculations of the cost and to submit a report for the purpose of the court proceedings.

[84] Hashim bin Ismail (PW2) affirmed an affidavit on 21 March 2005 styled as an 'affidavit of quantity surveyor for the plaintiff' as seen in bundle 'J'. At para 12 of that affidavit, Hashim bin Ismail (PW2) averred as follows:

> I have come to the conclusion that the actual costs incurred by the defendant (Melewar) in the improvements and renovations of the old buildings and structures as a result of the acquisition of the said property by the government would be RM1,651,434.36 as stated (at) p 5 of the JUB Report (quantity surveyor's report).

[85] The assessment by Hashim bin Ismail (PW2) was done based on the documents sent to him by Melewar's solicitors to UDA Holdings' solicitors. This was what Hashim bin Ismail (PW2) averred at para 9 of his affidavit that was affirmed on 21 March 2005:

> My assessment of the actual costs incurred by the defendant (Melewar) is based on the documents furnished to me by the solicitors for the defendant (Melewar) Messrs Heng & Mogan through the solicitors of the plaintiff (UDA Holdings) Messrs Wan Marican, Hamzah & Shaik and as a result of two visits that I made to the site of the said property.

[86] It is interesting to read the evidence of Hashim bin Ismail (PW2) when he was re-examined. I shall now reproduce verbatim his evidence as recorded at pp 20–21 of the notes of evidence:

> Re-examination of PW2 by Pawanchik
>
> Q: In your report some of the claims you have accepted and some you have rejected. What is the basis for rejection of some of the items?
>
> A: If you look at p 1 of the Quantity Surveyor's report, item 1 involves soft and hard landscaping works under the remarks column. The items that are claimable are the flag poles, monier paver, stage and changing room(s) and concrete balustrades. These items of works are affected by the land acquisition. I have computed the costs based on drawing, landscaped drawings provided. Whereas the defendant's claim of RM258,838.75 covers the total landscape for the Central Market and part of the landscaping works are not affected by the land acquisition. Item 2, the pedestrian bridge the amount incurred by the defendant is RM247,967.98. I have not allowed this claim because the pedestrian bridge is still in existence and the only sign of

renovation work is at the access step near (the) Central Market. I believe Putra LRT undertook the renovation works.

Q: From what you have said and from these reports, you will give reasons when you reject a particular item, is that correct?

A: Yes, Yang Arif.

Q: And when you give reasons is it in consonance with the Quantity Surveyor's practice?

A: Yes, Yang Arif.

[87] Under cross-examination, Hashim bin Ismail ('PW2') was quite categorical when he disagreed with the proposition advanced by the learned counsel for Melewar. At p 20 of the notes of evidence, the exchange was like this:

Put: That the items that you have rejected or reduced were wrongly rejected or reduced by you?

A: I disagree.

[88] It seems to me that Melewar disagrees with the estimates made by Hashim bin Ismail ('PW2'), yet Melewar did not appoint anyone to estimate the costs (see p 28 of the notes of evidence). This goes to show that Melewar has no basis to challenge the assessment of the 'actual cost' calculated by Hashim bin Ismail ('PW2').

[89] It is my judgment that since Melewar did not tender any alternative evidence in regard to the costs, Melewar cannot challenge the evidence of Hashim bin Ismail ('PW2') on the quantum of costs and must be bound by it.

[90] There is another issue that has to be considered. It is this. Are UDA Holdings and Melewar bound by the opinion of CH Williams on the apportionment of the compensation award?

[91] At para 21.4 of Melewar's statement of defence at p 40 of the bundle of pleadings, Melewar averred that:

> Section 9.01(c) of the lease agreement does not apply to compensation paid to the defendant (Melewar) in its own right as a lessee and hence CH Williams' conclusions are in any event plainly wrong.

[92] UDA Holdings states that the question that ought to be posed would

be in this manner: Have CH Williams discharged their duties as required of them by re-evaluating 'the quantum and distribution of the compensation' fully and correctly? And if the answer is in the positive then both UDA Holdings and Melewar are clearly bound by the terms of CH Williams' report. I say that the answer should be in the positive.

[93] There is no cogent proof that CH Williams have exceeded the boundaries of its mandate or that there is a patent error appearing on the face of CH Williams' valuation report. That being the case, CH Williams' valuation report should bind both UDA Holdings and Melewar. Normala Harun's letter dated 8 November 1997 as reproduced earlier leaves no room for doubt whatsoever. It is clear that by that letter each party has willingly taken the risk that CH Williams' conclusions may turn out adversely for one party and be favourable for the other party.

[94] It turns out that Melewar is unhappy when CH Williams' valuation report which decided that the bigger portion of the compensation money should be paid to UDA Holdings.

[95] At p 24 of the notes of evidence, Sharif Lough bin Abdullah ('DW1') states in his evidence-in-chief that it was never his understanding that CH Williams was making a legal interpretation. But, under cross-examination, Sharif Lough bin Abdullah (DW1) changed his story and he had this to say (see p 30 of the notes of evidence):

Q: There was no express provisions as to how CH Williams was to carry out its scope of work.

A: I would agree. It requires a certain interpretation at least.

[96] Abdul Halim bin Othman (DW1 in the counterclaim) disagrees, in cross-examination, that CH Williams is not entitled to undertake a legal interpretation of the lease agreement. The notes of evidence at p 36 would bear this out:

Q: At page 338 to 339 of bundle 'G' — no request to ask you to specifically interpret article 9, particularly section 9.01(c) and give a legal opinion?

A: My scope of work is stated under bidang kerja.

Q: You have not answered my question, can you answer it?

A: I disagree. Is there anywhere in this letter (page 338 to 339 of bundle 'G') for you to give a legal opinion — a specific request?

A: Under scope of bidang kerja no: 2.

Q: Your interpretation of scope of work no: 2 gives you the entitlement to interpret and give a legal opinion?

A: I suppose so, Yang Arif. In order to identify the interests of the lessor and the lessee as per Article IX, I have to understand and to interpret the provisions of Article IX.

[97] The letter from UDA Holdings dated 30 November 1997 to CH Williams sets out the scope of work for CH Williams to perform. That letter can be seen at pp 338–339 of the common bundle and it is worded as follows:

> PENGAMBILAN BALIK SECARA WAJIB SEBAHAGIAN TANAH YANG DIDUDUKI OLEH PASAR SENI KUALA LUMPUR (PT 1, SEKSYEN 31 BKL)
>
> Perkara diatas adalah dirujuk.
>
> Sukacita dimaklumkan bahawa pihak UHSB dan Tetuan Melewar Leisure Sdn Bhd dengan ini melantik pihak tuan untuk mengkaji dan memberi pandangan kedua mengenai dengan agihan jumlah pampasan yang telah dibuat oleh Jabatan Tanah Wilayah berkaitan pengambilan balik secara wajib tanah yang tersebut di atas.
>
> Bidang Kerja
>
> Skop kerja yang telah dipersetujui oleh kedua belah pihak ialah seperti berikut:
>
> 1. To advise on the heads of claims, allowable under the Compulsory Acquisition Act in respect of the compulsory acquisition of the subject property for the combined interests of the Lessor and Lessee.
> 2. To identify the interests of the Lessor and Lessee in accordance with the provisions of the Lease Agreement dated 5 September 1989 in particular Article IX on Compulsory Acquisition.
>
> Sepertimana yang telah dibincangkan tuan dikehendaki menyediakan laporan ini sebanyak dua set untuk UHSB dan dua set untuk Tetuan Melewar Leisure Sdn Bhd. dalam tempoh dua minggu dari tarikh surat ini dengan yuran yang telah dipersetujui iaitu RM6,000.00 (Ringgit Malaysia Enam Ribu Sahaja).

[98] Item 2 of the scope of work as reproduced above gives CH Williams the right to undertake such legal interpretation of the lease agreement. It is clearly worded and is not unambiguous.

[99] Both UDA Holdings and Melewar have jointly appointed CH Williams to re-value the quantum and distribution of the compensation awards. The agreed facts in bundle 'E' must be referred to because they reflect the intention of both parties. The pertinent parts of the agreed facts are as follows:

14. On 3 November 1997, the plaintiff and the defendant had agreed to appoint Chartered Surveyors M/s CH Williams Talhar & Wong Sdn Bhd, to revalue the quantum and distribution of the compensation monies to the parties.

15. Among the terms of appointment of M/s CH Williams Talhar & Wong Sdn Bhd were that they ought to take into consideration the valuation work in relation to the distribution of compensation monies, and the interest of the plaintiff and defendant pursuant to the Lease Agreement dated 5th September, 1989.

16. M/s CH Williams Talhar & Wong by a letter dated 8 December, 1997 gave their opinion as follows:

(a) 'The Land Acquisition Act provides for compensation to an interested party. The Lessee is an interested party.

(b) The legal rights of the Lessor and Lessee are well defined. On the norm, the proportionate value of the Lessor's interest are very small. (The property has been sold for the next 69 years).

(c) Article IX defines the apportionment of the compensation. As stated above the Lessee's share of the compensation could be 0 (zero) or at best a small percentage. The whole land value of RM7,581,997 — goes to the Lessor.

(d) Sharing the award based on Paragraph C is an unsolicited view of the undersigned.

[100] It is not the function of the courts to make contracts for the parties or to strike down or tamper with improvident bargains. Courts have only to interpret contracts made by the parties and come to decisive conclusions upon adjudication.

[101] Before me, the scenario is like this. Firstly, both UDA Holdings and Melewar deal with each other 'at arm's length' in the legal sense of the word. It means that each party relies on his own skill and judgment and that neither of them owes any fiduciary obligation to the other. Secondly, the parties bargain or negotiate until a deal is struck. Thirdly, each party is entitled to consult counsel and obtain legal advice. And this has been done. Fourthly, the deal is finally struck when both UDA Holdings and Melewar have jointly agreed to refer to CH Williams to re-evaluate 'the quantum and distribution of the compensation'. Fifthly, the scope of work of CH Williams has been set out in the letter from UDA Holdings to CH Williams dated 30 November 1997.

[102] In my judgment, there is nothing in CH Williams' valuation report to show that they have acted erroneously or exceeded their mandate that would entitle Melewar to resile from the contract to be bound by the decision of CH Williams. As far as the apportionment of the compensation award is concerned, both UDA Holdings and Melewar are bound by it. There are no two ways about it.

MELEWAR'S COUNTERCLAIMS AGAINST UDA HOLDINGS AND CH WILLIAMS

[103] I will now consider the counterclaims of Melewar.

[104] The facts leading to the counterclaim of Melewar against both UDA Holdings and CH Williams are based on the same set of facts that led to UDA Holdings' original action against Melewar.

[105] In the counterclaim, Melewar contends that CH Williams owed a duty to exercise reasonable care and skill in carrying out its task and in reaching CH Williams' conclusions. Melewar further contends that it was an implied term of the letter of appointment that CH Williams would exercise reasonable care and skill in carrying out its task and in reaching CH Williams' conclusions. Melewar also contends that CH Williams has breached its duty and the implied term by failing to properly consider and interpret the provisions of the lease agreement in particular Article IX thereof and by going beyond the scope of works stipulated in the letter of appointment. And as a result of CH Williams acts and omissions, Melewar has suffered loss and damage.

[106] Melewar's counterclaims against UDA Holdings and CH Williams jointly and severally and Melewar seeks the following reliefs:

(a) A declaration that Melewar is not bound by and does not have to comply with the conclusions of CH Williams as set out in CH Williams letter dated 8 December 1997;

(b) an order that the conclusions of CH Williams be set aside;

(c) such further or other relief as this honourable court may deem fit; and

(d) costs.

[107] Melewar also seeks an order that CH Williams indemnifies Melewar against:

(i) any liability arising directly or indirectly from the conclusions of CH Williams; and

(ii) any sums paid or payable by Melewar to UDA Holdings as a direct or indirect result of CH Williams' conclusions.

[108] Melewar also seeks by way of a counterclaim for an inquiry into the amounts payable by CH Williams to Melewar pursuant to the said indemnity.

[109] Melewar further seeks an order that CH Williams pays Melewar such amounts as may be found due pursuant to the said inquiry together with interest thereon at the rate of 8% per annum from the date of judgment to the date of full realisation and the costs of the said inquiry.

[110] UDA Holdings defence to the counterclaim constitutes an admission and a host of denials of Melewar's counterclaim and puts Melewar to strict proof thereof. UDA Holdings also prays that Melewar's counterclaim be dismissed with costs.

[111] CH Williams defence to the counterclaim constitutes a non-admission and a host of denials of Melewar's counterclaim. CH Williams avers in its defence to the following set of facts:

(i) that CH Williams was jointly instructed by UDA Holdings and Melewar to identify the interests of both UDA Holdings and Melewar in accordance with the provisions of the lease agreement dated 5 September 1989;

(ii) that CH Williams was not privy to the alleged meeting between UDA Holdings and Melewar that took place on 3 November 1997;

(iii) that CH Williams has no knowledge nor was it privy to any binding contract between UDA Holdings and Melewar;

(iv) that CH Williams has given its view in accordance with the terms of reference; and

(v) that CH Williams arrived at its conclusion on the interpretation of section 9.01(c) of the lease agreement in accordance with the practice of a prudent and reasonable valuer.

[112] By way of a defence to the counterclaim, CH Williams avers that Melewar has no cause of action arising from CH Williams alleged breach of duty (which is denied) because Melewar has not suffered any loss.

[113] CH Williams further avers that it has acted, at all material times, in accordance with the care and skill of a prudent and reasonable valuer and reiterates that it had acted, at all material times, in accordance with the terms of reference.

[114] For all these reasons, CH Williams prays that Melewar's counterclaim be struck off with costs. **A**

[115] In the course of analysing UDA Holdings original action against Melewar, the counterclaim of Melewar against UDA Holdings has partly been considered. **B**

[116] In considering Melewar's counterclaim against UDA Holdings, I must consider the issue of whether the agreement of Melewar to be bound by the opinion of CH Williams was subject to the issuance of the letter from UDA Holdings dated 21 November 1997. That letter can be seen at p 337 of the common bundle. It was a letter from UDA Holdings to the Central Market Development Sdn Bhd with a copy to Melewar and that letter was worded as follows: **C**

D

> RE: AN AGREEMENT DATED 29TH JUNE 1996 EXECUTED BETWEEN MELEWAR LEISURE SDN. BHD. ('MLSB') AND CENTRAL MARKET DEVELOPMENT SDN BHD ('CMD') IN RESPECT OF THE BUSINESS CARRIED ON ALL THOSE PIECES OF LAND HELD UNDER HS(D) 5034, PT NO 1 AND HS(D) NO 51859, PT NO 2 BOTH IN SECTION 31, TOWN OF KUALA LUMPUR, DISTRICT AND STATE OF WILAYAH PERSEKUTUAN **E**
>
> Further to our letter 29th August 1996 addressed to Melewar Leisure Sdn Bhd ('MLSB'), we write to confirm with you that 'MLSB' has at up to date duly complied with all the terms and conditions of the Lease Agreement dated 5th September 1989 granted by us to 'MLSB' over the above Lands. **F**
>
> Accordingly, subject to the condition that 'MLSB' shall continue to comply with the terms and conditions of the Lease dated 5th September 1989, we do not expect the said lease to be terminated.

G

[117] It is the stand of UDA Holdings that Melewar has agreed to be bound by the opinion of CH Williams and that such an agreement was not subject to the issuance of the letter of confirmation from UDA Holdings. From the tenor of the letter as reproduced, it is clear that the letter was issued by UDA Holdings upon the condition that Melewar would continue to comply with the lease agreement. This is also borne out by the witness statement of Fadzidah bt Hashim ('PW1') at para 37 of bundle 'I': **H**

Q: Going back to paragraph 31, regarding the confirmation by UDA that Melewar had complied with the Lease Agreement dated 5/9/1989, did UDA issue the confirmation? **I**

A: At first, yes. Via a letter dated 21/11/1997 at p 337 of the Common Bundle, UDA had given a confirmation although this confirmation was

A subject to the condition that Melewar would continue to comply with the Lease Agreement dated 5/9/1989.

[118] And during the cross-examination of Fadzidah bt Hashim (PW1) by
B learned counsel for Melewar, it was put to her that the agreement to appoint CH Williams was subject to the issuance of a letter of confirmation from UDA Holdings and she flatly denied it. Her evidence reads like this (see p 15 of the notes of evidence):

C Put: That the arrangement between the plaintiff and the defendant to refer the issue of revaluation of the Land Acquisition apportioned was subject to a condition namely that the plaintiff would not withdraw the letter of 21.11.1997 addressed to Central Market Development Sdn. Bhd. Do you agree?

D

A: No.

Put: That the plaintiff breached this arrangement by withdrawing the letter of the 21.11.1997. Do you agree or disagree?

E A: No.

[119] The next issue to be considered would be the question of whether the letter from UDA Holdings dated 21 November 1997 could be withdrawn or
F revoked. When Fadzidah bt Hashim (PW1) gave her evidence-in-chief, the learned counsel for UDA Holdings asked her a question after referring to the letter from UDA Holdings dated 30 November 1997 and her testimony can be seen at p 5 of the notes of evidence which reads as follows:

G Q: Daripada surat ini adakah apa-apa yang dikatakan di dalam surat ini bahawa ianya irrevocable?

A: Tidak.

H Q: Sebelum surat di page 337 of bundle 'G' dikeluarkan, adakah UDA pada mana-mana masa bersetuju bahawa surat pengesahan ini (letter of confirmation) suatu surat yang irrevocable?

A: Tidak Yang Arif.

I

[120] Melewar says that its agreement to appoint CH Williams was subject to the issuance of an irrevocable confirmation letter. And according to Sharif Lough bin Abdullah (DW1), Melewar agreed to CH Williams' appointment on the premise that UDA Holdings would issue an irrevocable confirmation

letter. The witness statement of Sharif Lough bin Abdullah ('DW1') at bundle 'K' at pp 4 and 5 read as follows:

Q19: What are these pre-conditions?

A19: Firstly, CHW's letter of appointment would be issued by the Plaintiff but its term of reference would be subjected to Melewar's prior agreement. Secondly, the basis of UDA and the Melewar's entitlement shall be determined by CHW and parties agreed to be bound by such determination. Thirdly, CHW shall take into consideration of the interests of the Plaintiff and the Defendant as accorded in the provisions of the Lease Agreement, in particular Article IX. Lastly, it was an implied term of the appointment that UDA would furnish the said confirmation as required by SC by way of an irrevocable letter.

[121] It seems logical that if the confirmation letter was revocable at any time at UDA Holdings instance then it would not have fulfilled the purpose for which Melewar wanted the letter namely for submission to the Securities Commission for the purpose of obtaining the approval for the exercise. At p 24 of the notes of evidence this was what Sharif Lough bin Abdullah (DW1) said in examination-in-chief:

Q: Page 337 of bundle 'G' is a letter dated 21.11.1997 issued by the plaintiff to Central Market Development Sdn Bhd. Can you tell Yang Arif why this letter was not intended to be revoked?

A: This letter was supposed to be submitted to the Securities Commission for the purpose of listing.

[122] It is argued that Melewar had, at that juncture, an iron-clad award from the land administrator in their favour. But, in order to obtain the confirmation letter, Melewar was prepared to agree to appoint CH Williams for a second opinion with full knowledge that this may lead to some degree of downward adjustment of Melewar's compensation. Melewar, however, did not expect a total reversal of their right to receive compensation based on CH Williams' report. It is argued that Melewar would never have agreed to accept this risk unless the confirmation letter was irrevocable in nature.

[123] It is argued that there is no reason to doubt Sharif Lough bin Abdullah's evidence that the confirmation letter was to be irrevocable. Sharif Lough bin Abdullah ('DW1') was present at the meeting on 3 November 1997 (see p 23 of the notes of evidence) when the agreement was reached between UDA Holdings and Melewar and it is emphasised that UDA Holdings has not led any evidence to contradict Sharif Lough bin Abdullah's evidence as to what had transpired at that meeting.

[124] Flowing from all these, it is the stand of Melewar and it is Melewar's submission that it was an implied term in the agreement reached between the parties on 3 November 1997 that an irrevocable letter would be issued. On the subject of implied terms, I was referred to the case of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151; [1998] 3 CLJ 503, FC, where Peh Swee Chin FJ, writing a separate judgment, had this to say at pp 169–170 (MLJ), pp 532–533 (CLJ), of the report:

> Reverting to the first type of implied term which is dependent on a court's drawing an inference as explained above, there are two tests to fix the parties with such an intention ie, that the parties must have intended to include such an implied term in the contract. The first test is a subjective test as stated by the Mackinnon LJ in *Shirlaw v Southern Foundries* [1928] Ltd [1939] 2 KB 206, at p 227, that such a term to be implied by a court is 'something so obvious that it goes without saying so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common 'Oh, of course'.'
>
> The second test, is that the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. The test was described by Lord Wright in *Luxor (Eastborne) v Cooper* [1941] AC 108, at p 137, that in regard to an implied term, '... it can be predicated that 'It goes without saying', some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended.' Business efficacy in my opinion, simply means the desired result of the business in question. Thus, in *Shirlaw* case, Shirlaw who was appointed the managing director by the defendant company for ten years, sued for and obtained damages for breach of agreement. It was held that it was an implied term that the defendant company would not alter its articles of association to create a right for itself to remove the plaintiff before the ten years' term expired. The implied term inferred by the court there was to let both parties achieve the desired result that the post of the managing director would continue to be available for ten years to Shirlaw as both parties must have intended it at the time when making the agreement.
>
> The testy answer to the question of the officious bystander of 'Oh, of course' spoken of by Mackinnon LJ, was described equally elaborately by Scrutton LJ in *Reigate v Union Manufacturing Co (Ramsbottom) Ltd* [1918] 1 KB 592 at p 605 as: '… Of course, so and so will happen, we did not trouble to say that, it too clear'.
>
> Both tests in my opinion must be satisfied before a court infers an implied term. Thus, Lord Wilberforce in *Liverpool City Council v Irwin & Anor* [1977] AC 239, at p 254 spoke of an implied term as a matter of necessity, so that the element of 'business efficacy is inseparable'. Lord Simon of Glaisdale in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 16 ALR 363 described both tests as conditions the compliance of which the court must be satisfied, in addition to what I may describe as other requirements, of existing law. Closer to home, Chong Siew Fai, J (as he then was) in *Yap Nyo Nyok v Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250 held that both tests must be satisfied. If the implied term was not necessary to give business efficacy, the answer to the officious bystander, would have been a testy answer of 'Oh, don't talk rubbish'.

[125] Melewar then advances an argument that it was an implied term of the agreement between UDA Holdings and Melewar on 3 November 1997 that the confirmation letter would be irrevocable. According to Melewar such an implied term is obvious and is necessary to achieve the commercial purpose of the agreement.

[126] It must be stated that UDA Holdings did, in fact, issue the letter of confirmation on 21 November 1997 as seen at p 337 of the common bundle and it has also been reproduced somewhere in this judgment. And it must also be stated that UDA Holdings proceeded to revoke the confirmation letter by another letter dated 17 December 1997 as seen at p 348 of the common bundle and that letter was worded as follows:

> RE: AN AGREEMENT DATED 29 JUNE 1996 EXECUTED BETWEEN MELEWAR LEISURE SDN. BHD. ('MLSB') AND CENTRAL MARKET DEVELOPMENT SDN BHD ('CMD') IN RESPECT OF THE BUSINESS CARRIED ON ALL THOSE PIECES OF LAND HELD UNDER HS(D) 5034, PT NO 1 AND HS(D) NO 51859, PT NO 2 BOTH IN SECTION 31, TOWN OF KUALA LUMPUR, DISTRICT AND STATE OF WILAYAH PERSEKUTUAN
>
> We refer to our letter on the above dated 21st November 1997.
>
> We regret to inform you that we hereby withdraw and revoke the above letter.
>
> Please be informed.
>
> Thank you.

[127] It is the submission of learned counsel for UDA Holdings that they revoked the confirmation letter when Melewar failed to comply with section 9.01(c) of the lease agreement once CH Williams had issued their opinion on 8 December 1997. The witness statement of Fadzidah bt Hashim ('PW1') at p 25 of bundle 'I' reads as follows:

Q: Why was the letter of confirmation of 21.11.1997 withdrawn and nullified by UDA?

A: Because Melewar did not comply with section 9.01(c) of the lease agreement dated 5.9.1989.

[128] It is emphasised that UDA Holdings revocation letter was issued five days before UDA Holdings letter to Melewar dated 22 December 1997 requesting Melewar to pay the money. The letter dated 22 December 1997 can be seen at p 349 of the common bundle and it was worded as follows:

> PEMBAHAGIAN PAMPASAN PENGAMBILAN TANAH SEBAHAGIAN PASAR BESAR KUALA LUMPUR DI ANTARA UHSB DAN MELEWAR LEISURE SDN BHD

Perkara di atas serta keputusan Jurunilai yang dilantik mengenainya yang dibincangkan antara pihak tuan dan pihak kami termasuk Jurunilai berkenaan pada 12 Disember 1997 adalah dirujuk.

Selaras dengan 'commitment' yang telah dipersetujui oleh pihak tuan melalui dokumen yang disempurnakan pada 13 November 1997 berkaitan perkara di atas sila pihak tuan ambil tindakan untuk melaksanakan obligasi tuan berdasarkan keputusan Jurunilai di atas.

Tindakan segera tuan di dalam perkara ini adalah diharapkan.

Sekian, untuk tindakan tuan seterusnya.

[129] Under cross-examination, Fadzidah bt Hashim ('PW1') admitted that no written demand was issed by UDA Holdings between 8 December 1997 and 17 December 1997 regarding payment of the compensation. Her testimony on this point can be seen at p 14 of the notes of evidence:

Q: Did you make a demand in writing between 8.12.1997 to the 17.12.1997 to the defendant with regard to the compensation payable?

A: No.

[130] Flowing from all these, Melewar submits that from the moment the revocation letter was issued and the confirmation letter revoked, Melewar was no longer obliged to comply with CH Williams' opinion.

[131] Did CH Williams exceed their scope of work? Melewar says that it was the understanding of the parties that the scope of work of CH Williams was to re-evaluate the quantum of compensation received by the parties. UDA Holdings makes an outright denial and says that Melewar's contention is intenable.

[132] Firstly, in answering this question, I need to refer to the letter dated 18 November 1997 from CH Williams addressed to UDA Holdings and Melewar. That letter can be seen at pp 335–336 of the common bundle and Melewar through Sharif Lough bin Abdullah ('DW1') confirmed acceptance of the scope of work of CH Williams. For convenience, I will now produce that letter:

COMPULSORY ACQUISITION OF PART OF 'CENTRAL MARKET' LAND

We refer to our meeting of November 13, 1997. As discussed we believe it is not necessary to carry out a valuation at this point in time. The valuation may be done if necessary at a later date. For now we suggest the following:

Scope of Work

1. To advise on the heads of claims, allowable under the Compulsory Acquisition Act in respect of the compulsory acquisition of the subject property for the combined interests of the Lessor and Lessee.

2. To identify the interests of the Lessor and Lessee in accordance with the provisions of the Lease Agreement dated 5 September 1989 in particular Article IX on Compulsory Acquisition.

Information

The following documents are required:

1. Copies of title documents.

2. Copy of the Lease Agreement.

3. Valuation Reports on the claims made.

The fee for the above is RM6,000/- (Ringgit Malaysia: Six Thousand Only) inclusive of disbursements but excluding government service tax. The above includes attendance at one meeting and is payable on submission of the report. For additional meetings and work outside the scope a fee of RM500/- per hour is payable.

Please confirm your instructions by signing this letter and returning the same to us.

Yours faithfully

C H Williams Talhar & Wong Sdn Bhd

Sgd. Illegible

Abdul Halim bin Othman

Director

I/We SHARIF LOUGH ABDULLAH on behalf of MELEWAR LEISURE SDN BHD would like to confirm acceptance of the above.

Sgd Illegible

Name: SHARIF LOUGH ABDULLAH

Date: 25 th November 1997

Co.Stamp: MELEWAR LEISURE SDN BHD

(CO.NO. 17292-U).

[133] I must emphasise that para 2 of CH Williams' letter dated 18 November 1997 sets out the actual scope of work and that must be acknowledged by this court. And CH Williams did not exceed their scope of work at all.

[134] Melewar's notion that CH Williams had acted beyond its scope of work appears, with respect, to be Melewar's own perception and understanding of CH Williams' letter dated 18 November 1997. Mohamed Azmi FCJ delivering the judgment of the Federal Court in *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243 aptly said at p 247 of the report:

> It is a well-established rule that the court cannot construe a legal document such as a lease by the acts of the parties or their own understanding of the document. In *Baynham v Guy's Hospital* (ante) which was referred to in *Sadlier v Biggs* 10 ER 531, Arden MR had this to say:
>
> > I strongly protest against the argument used by the learned judges in *Cooke v Booth*, Cow p 819, as to construing a legal instrument by the equivocal acts of the parties and their understanding upon it; which I will never allow to affect my mind.

[135] It is part and parcel of my judgment that what Melewar is contending is their own understanding of CH Williams' letter dated 18 November 1997. It certainly goes against the decision of the Federal Court in *Keng Huat Film*'s case.

[136] Secondly, there is a letter dated 19 February 1998 from Melewar to UDA Holdings as seen at pp 350–351 of the common bundle and that letter was sent by Melewar after CH Williams had submitted its report and expressed its opinion to the parties on 8 December 1997. And CH Williams' report did not exceed its scope of work. It must be borne in mind that Melewar wrote that letter after it became unhappy with the apportionment of the award as recommended by CH Williams which took into account the effect of section 9.01(c) of the lease agreement.

[137] Melewar argues that the evidence of the surrounding circumstances and the factual background are admissible in order to construe the scope of work of CH Williams as stipulated in CH Williams' letter dated 18 November 1997. This argument brings into sharp focus the question of whether the stipulations in CH Williams' letter dated 18 November 1997 are insufficient to construe the scope of work of CH Williams that it becomes necessary to supplement the stipulations by bringing in extraneous evidence? It is my judgment that the scope of work of CH Williams as set out in CH Williams' letter dated 18 November 1997 is not ambiguous nor defective as to require Melewar to bring in extraneous evidence. In this regard, the views of Mohamed Azmi FCJ in *Keng Huat Film*'s case merit reproduction. There at p 248, His Lordship had this to say:

In any event, it is our view that in the present case, the first lease on its face is sufficient to construe cl 4(e) without the necessity to supplement it by extraneous evidence.

[138] I will now examine the counterclaim of Melewar against CH Williams. The issues for determination in the counterclaim between Melewar and CH Williams are set out in bundle 'F' and I need to emphasise on some of these issues. I shall do so now.

(a) *Whether CH Williams' opinion is beyond the scope of work?*

[139] Once again, reference should be made to the letter of appointment dated 30 November 1997 as seen at pp 338–339 of the common bundle. The words employed therein are clear and unambiguous. It envisages the situation wherein CH Williams would have to interpret the LAA and Article IX of the lease agreement in order to ascertain the interests of both UDA Holdings and Melewar. This is the only way whereby CH Williams could have identified the interests of these two parties.

[140] It is clear that the basis of how CH Williams was to ascertain the interests of both UDA Holdings and Melewar was not mentioned except that CH Williams was only to consider the LAA and Article IX of the lease agreement. There was also no instruction that CH Williams was to ascertain just the quantum of compensation for UDA Holdings and Melewar.

[141] Indeed the letter dated 8 November 1997 from UDA Holdings to Melewar as seen at pp 185–186 of the common bundle and which has been re-produced earlier and which purportedly sets out the basis of how CH Williams was to ascertain the interests of both UDA Holdings and Melewar was never communicated to CH Williams and there was no evidence adduced to suggest that it was done. Even Sharif Lough bin Abdullah ('DW1') admitted this fact when he was being cross-examined as seen at p 30 of the notes of evidence.

[142] If it has only been the issue of quantum, why did Melewar not clarify the scope of work when CH Williams sent the letter dated 18 November 1997 as seen at pp 335–336 of the common bundle to UDA Holdings and Melewar? In fact, in that letter which has been reproduced earlier, CH Williams suggested that they ought not to do any valuation at all at that point in time.

[143] Thus, it is clear, contrary to what Melewar had submitted, that the

intention was to ascertain the 'rights' (employing Melewar's terminology) of both UDA Holdings and Melewar first before the quantum or valuation was even considered.

[144] One would have thought that Melewar would respond by saying that CH Williams was only to do a valuation. But, alas, Melewar unequivocally indorsed CH Williams scope of work by signing at p 336 of the common bundle. And this damning evidence was admitted by Sharif Lough bin Abdullah ('DW1') at p 30 of the notes of evidence.

[145] If it is true as alleged by Melewar that CH Williams was only to provide a second opinion pertaining to the valuation, why then, one may ask, was the scope of work expressed in such a convoluted manner. UDA Holdings and Melewar could have easily worked out their respective quantum upon receipt of the valuation from CH Williams in accordance with the example that is contained in pp 185–186 of the common bundle that has been produced somewhere in this judgment. It can only be surmised that CH Williams was asked to interpret the LAA and Article IX of the lease agreement.

[146] It is germane, at this juncture, to refer to the case of *Hambros Leasing Limited v Weatherall Green & Smith (a firm)* [Queen's Bench Division] (Transcript) 21 February 1997, (available on the internet) a decision of Neuberger J. There at p 10 this was what His Lordship said:

> Where a professional man, such as a surveyor, receives instructions from a client, the questions to be determined in a case such as this, are whether, in all the circumstances, a reasonably competent surveyor, acting in accordance with the professional standards which can be reasonably required of him, could have interpreted those instructions in the way in which he interpreted them and whether he should have appreciated that they required further clarification from the client and/or further consideration by the client. The answer to those questions must turn not merely on the terms of the instructions, but also on the identity of the client, the information which the surveyor is given about the proposed transaction, and the other facts and matters which are or ought to be available to the surveyor. In a sense, this is the approach embodied in the last two sentences of the passage which I have quoted from Robert Goff J. In a case of professional negligence, where the plaintiff's instructions are ambiguous, and the court concludes that the defendant ought to have sought further clarification, the fact that the plaintiff was responsible for the ambiguity can, in an appropriate case, be reflected in a finding of contributory negligence.

[147] Here, we have a situation where CH Williams in fact confirmed the scope of work with UDA Holdings and Melewar as alluded to at pp 335–336 of the common bundle and the scope of work has been re-affirmed in no

uncertain terms by Melewar and subsequently by UDA Holdings on the strength of the letter of appointment dated 30 November 1997 as reflected at pp 338–339 of the common bundle.

[148] It has never been an issue that CH Williams was to interpret Article IX of the lease agreement. In fact, Melewar's counterclaim at para 32 of p 41 of the bundle of pleadings spoke of the alleged failure of CH Williams to 'properly consider and interpret the provisions of the lease agreement, and in particular Article IX thereof, and by going beyond the scope of works stipulated in the letter of appointment'.

[149] The parties are certainly bound by their pleadings. It is a well settled principle of law that in the absence of pleadings, evidence if produced by the parties cannot be considered and no party shall be permitted to travel beyond its pleadings and that all necessary and material facts should be pleaded by the party in support of his case before the court (*Ram Sarup Gupta (dead) by LRs, v Bishun Narain Inter College & Ors* and *K Kanakarathnam v A Perumal & Anor*). No evidence can be led on a fact that is not pleaded (*Hari Chand v Daulat Ram* AIR 1987 SC 94). Put differently, it is not open to the parties to give up the case set out in the pleadings and propound a completely new and different case (*Vinod Kumar Arora v Smt Surjit Kaur* AIR 1987 (Vol 74) SC 2179 at p 2183). So, arising from Melewar's counterclaim, only two observations can be made. Firstly, Melewar had never pleaded that CH Williams had breached its alleged duty owed to Melewar by giving a 'legal' interpretation of Article IX of the lease agreement. Secondly, Melewar had failed to particularise details as to how CH Williams had gone beyond the scope of works stipulated in the letter of appointment. What is apparent is this. That the issue was only raised for the very first time in Sharif Lough bin Abdullah's witness statement as seen at pp 5–6 of bundle 'K' at Q & A 25. It is now evident that Melewar's contention was nothing more than an afterthought and it is argued by learned counsel for UDA Holdings that Melewar's blatant attempt to improve its case which runs counter to its pleadings must be prohibited by this court. It is germane to mention that learned counsel for CH Williams had put on record his objection and that objection can be seen at p 41 of the notes of evidence. Gunn Chit Tuan SCJ in *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152 (SC) at p 154, gave a stamp of approval to the speech of Sharma J, in *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 and this was what His Lordship said in *Yew Wan Leong*:

> The learned judge had therefore erred in holding that there was a new substituted contract, and reference was made to *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 in which Sharma J (as he then was) had made observations on the function of pleadings and the duty of courts to follow rules of procedure and practice. We agreed with the following passage in the judgment of the learned judge in that case in which His Lordship stated:

> The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

Counsel also referred to *Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan* [1987] 1 MLJ 393 at p 395 in which case this court had also referred to *Janagi v Ong Boon Kiat* and considered that Sharma J had rightly held that the trial of a suit should be confined to the pleas on which the parties are at variance.

[150] It was inevitable that CH Williams had to interpret Article IX of the lease agreement and that was done. The interpretation by CH Williams was solely to ascertain the interests and the rights of both UDA Holdings and Melewar respectively before the quantum of compensation due to either of them could be worked out. It was as simple as that. As I see it, Melewar is going into semantics when it submitted that CH Williams was only asked to consider section 9.01 of the lease agreement in so far as it affected the quantum of the compensation awarded by the land administrator and not the right to such compensation. In the first place, if there was no right to receive compensation then the issue of quantum would be academic.

[151] Abdul Halim bin Othman ('DW1') is a valuation surveyor with over 30 years of working experience in his specialised field. He has a degree in estate management and among the subjects which he studied were land law, surveying, and building construction. He graduated from Reading University in the United Kingdom and he testified at p 34 of the notes of evidence to this effect:

> The land law which I studied would be English land law. One of the contracts was the law on contract. The English law of contract. I confirm that I am not a legal expert. I am not an advocate and solicitor and neither am I an expert in the law of Malaysia. I consider myself quite knowledgeable on land law.

[152] And at p 37 of the notes of evidence, Abdul Halim bin Othman ('DW1') testified that he is competent to interpret the deeds because of his knowledge of the English language and his knowledge of property law. At p 39 of the notes of evidence, he admitted that his interpretation is not in the legal sense and that he only interpreted the scope of work of the lessor and the lessee. Again, at p 49 of the notes of evidence, he categorically testified as follows:

When I read sections 9.01(a), (b) and (c), I interpret it that the bulk of the award will go to the lessor except for the costs incurred on improvements and renovations.

[153] It must be borne in mind that the interpretation of a document like the lease agreement at hand is not the sole domain of lawyers. A witness like Abdul Halim bin Othman ('DW1') qualified in estate management with over 30 years of working experience has interpreted section 9.01 of the lease agreement. It is interesting to refer to the case of *Pioneer Shipping Ltd & Ors v BTP Tioxide Ltd* [1982] AC 724 (HL). There, the arbitrator gave his decision and held that (see p 748 of the report), '*the whole of the consecutive voyage charterparty dated November 3 [sic], 1978, was frustrated by September 26, 1979*' and his decision was affirmed by the House of Lords. It is enlightening to read the judgment of Lord Diplock who wrote a separate judgment in that case. There, Lord Diplock had this to say at p 736:

Of course the dispute involves some question of law. It is difficult to conceive of a dispute under a charterparty that does not do so. The dispute is likely to be about what the parties have agreed shall be their respective legal rights and obligations in events that have actually happened or, it may occasionally be, in events that it is anticipated may happen. The answer must depend upon the true construction of the agreement between the parties; and in English jurisprudence, as a legacy of the system of trial by juries who might not all be literate, the construction of a written agreement, even between private parties, became classified as a question of law. The object sought to be achieved in construing any commercial contract is to ascertain what were the mutual intentions of the parties as to the legal obligations each assumed by the contractual words in which they (or brokers acting on their behalf) chose to express them; or, perhaps more accurately, what each would have led the other reasonably to assume were the acts that he was promising to do or to refrain from doing by the words in which the promises on his part were expressed. In the case of a 'one-off contract' where the exact combination of words and phrases that fall to be construed has not only never been used before and so did not possess an already established meaning of which each party was entitled to assume the other knew when he entered into the contract, but is also unlikely to be used in future by any other parties, it is not self-evident that an arbitrator or arbitral tribunal chosen by the parties for his or their experience and knowledge of the commercial background and usages of the trade in which the dispute arises, is less competent to ascertain the mutual intentions of the parties than a judge of the Commercial Court, a Court of Appeal of three Lords Justices or even an Appellate Committee of five Lords of Appeal in Ordinary. A lawyer nurtured in a jurisdiction that did not owe its origin to the common law of England would not regard it as a question of law at all. This, I believe, was all that Lord Denning MR meant to convey by his vivid, if somewhat less than tactful, phrase: 'On such a clause, the arbitrator is just as likely to be right as the judge — probably more likely' ([1980] QB 547, 564G). Nevertheless, despite the disappearance of juries, literate or illiterate, in civil cases in England, it is far too late to change the technical classification of the ascertainment of the meaning of a written contract between private parties as being

'a question of law' for the purposes of judicial review of awards of arbitrators or decisions of administrative tribunals from which an appeal to a court of justice is restricted by statute to an appeal upon a question of law.

[154] Since Abdul Halim bin Othman ('DW1') is not legally qualified, his interpretation of section 9.01 of the lease agreement can be construed to be a 'non-legal' interpretation. It is up to this court to interpret it accordingly and this has been done.

(b) *Whether Melewar has a cause of action against CH Williams founded on negligence?*

[155] On the facts, Melewar has no cause of action against CH Williams in negligence because Melewar had not suffered any loss or damage. After receiving the compensation monies, Melewar did not pay out anything to UDA Holdings pursuant to CH Williams' report. In the upshot, there is no actionable tort because the tort of negligence is not a tort actionable per se. This simple proposition of law can be distilled from the case of *Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343 (CA). There, writing for the court, Lord Wright MR had this to say at p 351 of the report:

> The cases in which actions are not maintainable without proof of actual damage, that is to say, where damage is the gist of the action, and where the cause of action is not complete without proof of damage, fall into a different category. The most obvious and familiar is an action for negligence regarded as an independent tort; malicious prosecution is another; so also conspiracy to injure and deceit and, subject to certain exceptions, slander. In all these cases there is no actionable wrong unless damage has been caused to the plaintiff by what has been done or omitted. Thus, in the case of negligence, the plaintiff is not entitled to complain unless he is injured by the negligence; otherwise the negligence does not interest or concern him; the same is true of conspiracy; so of deceit; there is in those cases no interference with a right, no disturbance or invasion of a right of property or any other right; thus, eg, the cause of action is not merely that the defendant was negligent, but he was negligent in such a way as to damage the plaintiff.

[156] To confound the matter further, Melewar had not pleaded any particulars of loss and damage and, consequently, Melewar should not be allowed to rely on the evidence adduced to improve Melewar's pleadings (*Yew Wan Leong*'s case).

[157] I hold and it is my judgment that Melewar's action in negligence against CH Williams is entirely premature and should be refused.

(c) *Is there a duty of care owed by CH Williams to Melewar? What is the standard of the duty of care?*

[158] The evidence shows that CH Williams was instructed to interpret, inter alia, Article IX of the lease agreement. It is therefore too late in the day for Melewar to say that 'if they had wanted a legal opinion they would have asked a lawyer to do it'. The obvious retort to this would be that since Melewar had clearly and unequivocally instructed CH Williams to do the interpretation, Melewar cannot expect the same standard of care that a lawyer is expected to render.

[159] Abdul Halim bin Othman ('DW1') should not be expected to be aware of the niceties of the canons of construction applicable to interpret certain documents. The standard of care that would be expected of CH Williams in interpreting Article IX of the lease agreement is merely that of a lay valuer as opposed to a lawyer notwithstanding the fact that Abdul Halim bin Othman ('DW1') is proficient in the English language.

[160] Of course, there is a duty of care owed by CH Williams to Melewar and that duty of care owed is merely that of a prudent and reasonable valuer and nothing else. Consequently, the standard of care is that of a valuer and not as a lawyer.

[161] What Goddard J, said in *Philips v William Whiteley Ltd* [1938] 1 All ER 566 in regard to a jeweller is applicable to a valuer like our case at hand. At p 569 of the report, this was what Goddard J, had to say:

> I do not think that a jeweller holds himself out as a surgeon or professes that he is going to conduct the operation of piercing a lady's ears by means of aseptic surgery, about which it is not to be supposed that he knows anything.
>
> If a person wants to ensure that the operation of piercing her ears is going to be carried out with that proportion of skill and so forth that a Fellow of the Royal College of Surgeons would use, she must go to a surgeon. If she goes to a jeweller, she must expect that he will carry it out in the way that one would expect a jeweller to carry it out.

(d) *Whether CH Williams has breached its duty of care and skill?*

[162] We must bear in mind that the standard of care that is expected of CH Williams is that of a prudent and reasonable valuer. We must also bear in mind that whether CH Williams had breached its duty of care must be seen in the context of whether CH Williams in discharging its obligations pursuant to the appointment had fallen below the standard expected of it as a valuer and not that of a lawyer.

[163] It must be recalled that Melewar's counterclaim was that CH Williams had breached its duty by going 'beyond the scope of works stipulated in the letter of appointment' without particularising exactly how CH Williams had gone beyond the scope of works. The particulars were not pleaded but they were led by way of evidence which should not have been done. Be that as it may, CH Williams had interpreted Article IX of the lease agreement and had therefore acted within the scope of the letter of appointment. But, what is left to be considered is whether CH Williams had failed to 'properly consider and interpret the provisions of the lease agreement and in particular Article IX thereof' as pleaded at para 32 of the counterclaim and as seen at p 41 of the bundle of pleadings.

[164] It all boils down to the interpretation of the lease agreement.

[165] And what Abdul Halim bin Othman ('DW1') had done was to construe Article IX in accordance with the ordinary meaning of the words that were used. This method of interpretation is known as the 'Golden Rule'. It is applied by Lord Wensleydale in *John Grey & Ors v William Pearson & Ors* (1857) 6 HL Cas 61 at p 106; (1857) 10 ER 1216 and at p 1234, and this was what His Lordship said:

> I have been long and deeply impressed with the wisdom of the rule, now, I believe, universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.

[166] And Lord Blackburn in *Caledonian Railway Company v North British Railway Company* (1881) 6 App Cas 114 at p 131 vigorously adopted the above mentioned passage of the judgment of Lord Wensleydale in *John Grey*'s case.

[167] *Maunsell v Olins & Anor* [1975] AC 373 (HL), dealt with a point of construction as to the meaning of the word 'premises'in s 18(5) of the Rent Act 1968, but is nevertheless helpful in assisting me in arriving at a proper conclusion as to the appropriate rule of construction in construing section 9.01(c) of the lease agreement. Lord Simon of Glaisdale in collaboration with Lord Diplock had this to say at pp 390–391 of the report:

> The 'golden' rule of construction
>
> What *Maxwell on Interpretation of Statutes*, 12th Ed (1969), p 28, calls 'the first and most elementary rule of construction'

is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and otherwise in their ordinary meaning.

This 'golden' canon of construction has been so frequently and authoritatively stated that further citation would be otiose. It is sometimes put that, in statutes dealing with ordinary people in their everyday lives, the language is presumed to be used in its primary ordinary sense, unless this stultifies the purpose of the statute, or otherwise produces some injustice, absurdity, anomaly or contradiction, in which case some secondary ordinary sense may be preferred, so as to obviate the injustice, absurdity, anomaly or contradiction, or fulfil the purpose of the statute: while, in statutes dealing with technical matters, words which are capable of both bearing an ordinary meaning and being terms of art in the technical matter of the legislation will presumptively bear their primary meaning as such terms of art (or, if they must necessarily be modified, some secondary meaning as terms of art).

[168] Abdul Halim bin Othman ('DW1') having arrived at the correct conclusion by applying the 'Golden Rule', the crucial question to pose is whether it can be said that Abdul Halim bin Othman's conclusion was absurd, inconsistent or repugnant.

[169] At its highest point, Abdul Halim bin Othman's conclusion may be wrong but certainly it cannot be said to be absurd, inconsistent or repugnant. These words are strong words which are only fit for extreme cases. Applying the 'Golden Rule', Abdul Halim bin Othman's interpretation of Article IX can be said to be tenable.

[170] In my judgment, CH Williams had not breached its duty. It is also my judgment that it does not lie in the mouth of Melewar to even suggest that CH Williams had not consulted a lawyer or had acted beyond the scope of its appointment and expertise for the following salient reasons:

(i) the particulars of the breach of duty were never pleaded and, at this juncture, Melewar should not be allowed to improve its pleadings by adducing evidence (*Yew Wan Leong*'s case);

(ii) the overwhelming evidence shows that CH Williams was in fact instructed to interpret Article IX of the lease agreement by both UDA Holdings and Melewar jointly;

(iii) the standard of care expected of CH Williams would be that of a prudent and reasonable valuer interpreting the lease agreement; and

(iv) CH Williams had not fallen below the standard of care that would have

A been expected of a valuer in interpreting the lease agreement.

(e) *Has Melewar suffered loss?*

B **[171]** I would answer this question in the negative for the following reasons:

(i) Melewar did not be plead the particulars of loss and damage in its pleadings and therefore must be precluded from relying on the evidence adduced to improve its pleadings (*Yew Wan Leong*'s case);

C

(ii) Melewar has not proven any loss as it had not paid out any amount from the compensation which it had received;

(iii) the loss and damage are too remote and they are not reasonably foreseeable and in any event not caused by CH Williams at all; and

D

(iv) the alleged losses from Melewar's inability to be listed on the Kuala Lumpur Stock Exchange are too remote in that they were not foreseeable by CH Williams. Such losses, in the law of contract, would be classified as 'special damages' within the second limb of the rule in *Hadley & Anor v Baxendale & Ors* (1854–1860) All ER Rep 461 which has been codified in s 74 of the Contracts Act 1950 (Act 136). Now, 'special damages' are recoverable provided it can be shown that such losses were within the contemplation of the parties at the time of the inception of the contract. Here, it would be at the time when CH Williams was appointed. But, unfortunately, no evidence was led to show that CH Williams was aware of Melewar's intention to be listed on the Kuala Lumpur Stock Exchange. A good illustration of the working of s 74 of the Contracts Act 1950 (Act 136) can be seen in the Federal Court case of *Tham Cheow Toh v Associated Metal Smelters Ltd.* [1972] 1 MLJ 171 (FC). There, Ali FJ, delivering the judgment of the Federal Court had this to say at pp 172–173 of the report:

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> The measure of damage recoverable involves the consideration of section 74 of the Contracts (Malay States) Ordinance which substantially affirms the rule of common law laid down in *Hadley v Baxendale* (1854) 9 Exch 341 which was in two parts, namely (1) damage arising naturally, i.e. according to the usual course of things from the breach, and (2) when they are such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. In our view this case falls within the second rule which is that the appellant would not be liable for payment of damages for loss of profits unless there is evidence before the court that the special object of the furnace had been drawn to their attention and that they contracted on the basis that delay in delivery of the particular furnace would make them liable to payment of loss of profits.

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[172] It is my judgment that Melewar has no cause of action in negligence against CH Williams. Here, the 'special damages' are not reasonably foreseeable and they are also too remote to be recoverable in negligence. Ong Hock Thye FJ delivering the judgment of the Federal Court in *Ling Nam Rubber Works v Leong Bee & Co* [1968] 1 MLJ 216 had this to say at p 217:

> There is, however, one common feature of liability, both in negligence and nuisance, for which one need only refer conveniently to *The Wagon Mound (No 1)* [1961] 1 All ER 404, at p 415 and *The Wagon Mound (No 2)* [1966] 2 All ER 710. The test is the same for each tort, namely foreseeability of the damage. Thus, it was laid down in *The Wagon Mound (No 1)* at p 415 that in negligence 'the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen'. Then, in *The Wagon Mound (No 2)*, at p 717, it was affirmed that 'it is not sufficient that the injury suffered ... was the direct result of the nuisance if that injury was in the relevant sense unforeseeable'.

[173] There is another matter that has to be highlighted. It is this. There is no evidence to show that the retraction of the letter dated 21 November 1997 as seen at p 337 of the common bundle by UDA Holdings had caused the failure of Melewar to be listed on the Kuala Lumpur Stock Exchange. Sharif Lough bin Abdullah ('DW1') admitted that there were other causes for Melewar's failure to be listed yet, sad to say, Melewar failed to produce such evidence when they had the chance to do so (see p 31 of the notes of evidence). One would have thought that Melewar would be expected to adduce such evidence. Sharif Lough bin Abdullah ('DW1') testified that he had to go back to re-look at his files. Yet, no reasons were advanced for Sharif Lough's failure to produce his files. Those files might carry the other reasons. At p 31 of the notes of evidence, Sharif Lough bin Abdullah ('DW1') testified as follows:

Q: Do you confirm that the failure of the defendant is this — was not because of UDA's revocation of the letter of confirmation?

A: I confirm that it was not the sole issue.

Q: What were the other reasons?

A: It is 10 years. I have to go back to re-look at my files again.

[174] I would certainly invoke s 114(g) of the Evidence Act 1950 and make an adverse inference against Melewar on the failure to produce those files (*Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33; and *Subry bin Hamid v Husaini bin Tan Sri Ikhwan & Anor* [2006] 6 MLJ 229).

[175] However, there is evidence to suggest that despite the revocation of

the letter by UDA Holdings, Melewar went ahead with its application to the Securities Commission to list Melewar. This move by Melewar suggests that the revocation of the letter by UDA Holdings had nothing to do with Melewar's failure to be listed.

CONCLUSION

[176] In the original action between UDA Holdings and Melewar, the breakdown of UDA Holdings claims against Melewar are as follows:

(i)	Compensation award for the value of the land paid to Melewar —	RM7,199,840
(ii)	Additional compensation for the value of the land paid to Melewar —	RM896,774
(iii)	Compensation award for the value of the land for UDA Holdings —	RM382,157
(iv)	Total compensation for the value of the land —	RM8,478,771
(v)	Less compensation for the value of the land payable to UDA Holdings —	RM382,157
(vi)	Less the actual costs incurred by Melewar in carrying out improvements and renovations to the old buildings and structures based on the Quantity Surveyor's report dated March 21, 2005 as per bundle 'J' —	RM1,651,434.36
(vii)	The total compensation payable by Melewar to UDA Holdings —	RM6,445,179.64

[177] For the original action, I accordingly give judgment to UDA Holdings against Melewar in the sum of RM6,445,179.64 together with interest at the rate of 8%pa from 12 April 1995 until settlement together with costs.

[178] As far as the counterclaim of Melewar against UDA Holdings is concerned, I dismiss it with costs.

[179] I also dismiss the counterclaim of Melewar against CH Williams with costs.

Plaintiff's claim allowed with costs and defendant's counterclaim dismissed with costs.

Reported by Augustine Soosay